UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Douglas A. Kelley, in his capacity as the Trustee of the BMO Litigation Trust, Plaintiff, vs. BMO Harris Bank N.A., as successor to M&I Marshall and Ilsley Bank, Defendant.	File No. 19-cv-1756 (WMW) St. Paul, Minnesota November 3, 2022 10:36 a.m.

BEFORE THE HONORABLE WILHELMINA M. WRIGHT
UNITED STATES DISTRICT COURT JUDGE

(JURY TRIAL PROCEEDINGS - VOLUME XIV)

Proceedings reported by certified court reporter; transcript produced with computer.

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I N D E X

P R O C E E D I N G S

IN OPEN COURT

(JURY NOT PRESENT)

THE COURT: Okay. So we have a few things to address today.

I want to first of all confirm on the record, Counsel, that you've reviewed the contents of the admitted exhibits folders in Box.com and agree that those exhibits and folders are complete and correct.

MS. MOMOH: Good morning, Your Honor. Adine Momoh on behalf of the defendant, BMO Harris Bank.

THE COURT: Good morning, Ms. Momoh.

MS. MOMOH: We have conferred with the other side, and we do believe that the exhibits that are in Box are accurate and up to date for both sides.

But we did raise with plaintiff's counsel this morning the issue of some of the documents that were marked as plaintiff's exhibits needing to be redacted, and so we're going to be working with counsel for the plaintiff today to resolve those issues.

THE COURT: That's terrific. Thank you, Ms. Momoh.

MS. MOMOH: Thank you, Your Honor.

MR. REIF: Your Honor, Michael Reif for the plaintiff.

We agree we are going to be working with BMO on this today and will also be working on a joint index to be able to submit to the Court, but that's a work in progress right now.

THE COURT: Okay.

MR. REIF: Thank you, Your Honor.

THE COURT: Happy to hear it. Thank you, Counsel.

MS. MOMOH: Thank you.

THE COURT: So we also have cross-motions on the judgment as a matter of law. Are the parties ready to proceed?

MR. MOHEBAN: We are, Your Honor.

THE COURT: Okay.

MR. MARDER: We are, Your Honor. Just one preliminary matter. You may recall we had asked to re-call Mr. Martens as a rebuttal witness. I understand Your Honor has already rejected that request, but now that the defendants have formally rested, we just, for the record and for appellate purposes, wanted -- and to preserve that issue, we wanted once again to submit our request to have Mr. Martens testify as a rebuttal witness, understanding the Court has already rejected that request, but just for the record, we wanted to state that.

THE COURT: Very well.

MR. MARDER: I assume that's denied?

THE COURT: It has been denied.

MR. MARDER: Thank you, Your Honor.

THE COURT: So then we will go forward with the plaintiff's motion for judgment as a matter of law only as to defendant's affirmative defenses.

MR. MOHEBAN: Do you want to go first?

THE COURT: You tell me how you would like to proceed, Counsel.

MR. MOHEBAN: Your Honor, we had discussed -- Keith Moheban on behalf of BMO Harris Bank.

We had discussed taking it sort of in order of the case, so we would do the defendant's Rule 50, then the plaintiff's Rule 50.

We understand also that we have an hour. And so I can tell you that for our side, I will be arguing our motion and Mr. Gants will be arguing the opposition to their motion. And we will try to reserve time for rebuttal, so we're going to keep track of time here.

THE COURT: Very well.

MR. MOHEBAN: Lastly, I do have a handful of slides that I wanted to display during the argument, if that is acceptable.

THE COURT: Is there any objection?

MR. MARDER: No objection, Your Honor. We have slides too.

MR. MOHEBAN: Just going to give Mr. Herzka a minute to get that set up.

May it please the Court, Your Honor, Counsel. BMO Harris Bank moves for judgment as a matter of law on all claims.

We have a number of arguments in the brief. I'm going to limit my argument today to the most obvious reasons why the Court should grant judgment as a matter of law to BMO Harris, and that starts with we all sat here and watched the plaintiffs put in a negligence case over the last three weeks.

How many times did we hear counsel say to an AML analyst or to a banker: You could have just picked up the phone and called someone. You could have looked more thoroughly into this. You could have. You should have. We heard that time and time again, of course, with the benefit of 20/20 hindsight, but that's the sum total of the evidence that the plaintiff has put forward here.

It's a negligence case that has been presented to the jury, but there is no negligence claim in the case. And because they have not submitted evidence that a reasonable jury could find the proper level of state of mind, which is actual knowledge or bad faith, there's nothing to present to the jury and no reasonable jury could find in their favor.

If you look at our first slide, this is not

disputed. Aiding and abetting fraud requires actual knowledge of that fraud. Aiding and abetting breach of fiduciary requires -- fiduciary duty requires actual knowledge of that breach. And the Minnesota Uniform Fiduciary Act requires actual knowledge that in the processing of a transaction, the fiduciary in doing that is breaching a fiduciary duty, fiduciary in this case being the principals at PCI.

I will get to bad faith in a moment, but on this actual knowledge point, what is the evidence that we heard?

We started out with testimony from five AML analysts from the bank. They weren't accused of having actual knowledge of the Ponzi scheme. In fact, they were criticized for not knowing more. Sum total of plaintiff's critique of the AML analysts was they didn't look far enough to find enough information. Each and every one of them denied having actual knowledge. There's no evidence that contradicts that.

Same thing with the bankers, with Mr. Jambor, with Mr. Flynn. They were criticized for the things that they didn't know about, that Mr. Flynn didn't look at the account to find out more information. They both denied having any actual knowledge. And there's no allegation to the contrary there either.

We heard from the perpetrator, Deanna Coleman.

She confirmed that M&I did not have any actual knowledge.

And then we get to the statements of the plaintiffs themselves. Let's remember what plaintiff's expert said in this case. Plaintiff's expert had no evidence of actual knowledge. They didn't review the record and find evidence of actual knowledge. They made a list of things that M&I should have done, again, on a negligence standard.

If we go to the next slide, let's see what the plaintiff himself and plaintiff's counsel has said on this point. We emphasized this in our brief, and I want to -- I highlighted the word "claiming." Mr. Anthony and Mr. Kelley certainly know how to try a case. They made the choice to put this evidence in the record and they used the term "claiming."

And on this point, Your Honor, the cow is out of the barn, if that's the expression, horse, cow, whatever that is. They've told the jury that they are not claiming that any M&I employee had actual knowledge. I mean, they've tried to parse this in their opposition, but that's what the jury has heard. And having said this to the jury, how could a reasonable jury now be asked to look at the issue of actual knowledge?

And plaintiffs doubled down on this in their opposition brief to this motion where they go on -- again,

they're talking not about what the evidence is. They're talking about their contentions, and they're saying they don't contend that any BMO employees participated or were co-conspirators in the scheme.

So having disclaimed actual knowledge, why are we sending this to the jury? On what basis could a reasonable jury find that?

And I want to say these statements by plaintiff and plaintiff's counsel also encompass the issue of the adverse inference on spoliation. They could have said -- Mr. Anthony could have said, Well, isn't it possible there's some evidence that got destroyed that would support your claims? But that's not what they told the jury.

They said they're not making that claim and plaintiffs in their brief say we are not making that contention with full knowledge of the adverse inference. And so there just isn't an actual knowledge -- there are not facts that would support actual knowledge.

And that brings us -- so with respect to aiding and abetting fraud, there's an element they can't prove. With aiding and abetting breach of fiduciary duty, there's an element they can't prove. And on the UFA, one of the two prongs are dispensed with based on the lack of evidence and their own admissions and statements to the jury.

Also on the issue of actual knowledge, if we go to

the next slide -- and this is important and not reflected in the Court's current jury instructions, but is the law -- you cannot piece together the knowledge that Mr. Flynn had from a meeting that he had in 2002 and add that to what Ms. Pesch found out, you know, 300 miles away years later with regard to what the Petters Company was and what somebody else might have seen when they looked into the accounts. You can't aggregate the knowledge of everyone in the bank to prove actual knowledge. And if you do take this to the jury, you have to make that clear.

But, again, there is no -- who is the person? If there's someone at the bank who had actual knowledge of this scheme, who is it? That goes unanswered because there is no person, and that's why no reasonable jury could conclude that there is a person at M&I Bank who had actual knowledge of the scheme during that time.

Let's then turn to bad faith, which is the next slide, and here the Minnesota Supreme Court has made pretty clear -- and this is, I think, properly reflected in the jury instructions -- bad faith does not exist if the bank was acting honestly.

And the dishonesty has to be proven with respect to a specific transaction. And, again, where is the evidence of that? Nobody is contending that any of the AML analysts were dishonest or that the bankers were dishonest.

They're criticized for not being thorough, maybe not putting the pieces together, again, on a negligence basis, but nobody has contended that they were acting dishonestly.

And, in fact, counsel, you know, should be -- plaintiff should be estopped from arguing dishonesty because you see Mr. Lawrence's comments here in the sidebar. In their efforts to avoid -- you know, or to prevail on an evidentiary issue, plaintiff's counsel said, "Mr. Flynn's honesty or his character for truthfulness has not been put at issue." Again, this is not me characterizing what's at issue in the case. This is plaintiff's counsel saying that.

And then, lastly, what's the transaction? The UFA is not a broad, you know, look at all your fiduciary duties and see if the parties did anything wrong. The UFA is based on specific transactions, checks in particular is what the statute says.

What's the transaction that the jury is going to find that someone at M&I processed dishonestly? There just simply is no evidence by which this could go to the jury.

I want to turn now to the next chart -- or the next slide, which has to do with breach of fiduciary duty. And so this is the claim that M&I itself had a fiduciary duty to PCI, which in itself logically is really hard to understand because PCI, of course, was inherently corrupt. PCI and its principals were inherently involved in all

aspects of the scheme. So how could any kind of action that M&I would take, you know, harm PCI, which was fully invested and existed only to be a fraud?

But if we want to go with the plaintiff's argument, the argument is we entered into a DACA, the bank entered into a contract. That contract supposedly created fiduciary duties. You know, that in itself is very questionable.

But for purposes of this argument, let's assume that they did prove that those -- that contract, the DACA contract, created a fiduciary duty. Then how do they prove breach?

The breach would have to be that M&I violated the agreement, and there is no evidence of that. It was well established at trial the predicate for any performance by M&I on the DACA was that PCI itself had to provide the transaction list or put money into these accounts. So then again, when we look at this, M&I didn't breach anything.

And how could that breach of fiduciary duty, if we were to do something under these DACAs, how could that possibly harm PCI when the reason we didn't do anything was because PCI didn't perform under the contract?

So this -- logically, it makes no sense. The whole notion of this claim just simply makes no sense. But there is no -- no one will come here today, Your Honor, and

say this provision of this contract was breached by M&I. There's no evidence of that.

So, lastly, I want to cover the issue of punitive damages. This is not a normal thing, to put punitive damages to the Court -- to the jury. And the Court has the gatekeeper role under the statute to decide, having heard now all the evidence, is there enough evidence for a jury to actually find the required mental state, which is maliciousness, which is deliberate disregard. That's what the cases say.

And this is in the context of where the jury, apparently, is already going to be presented with an astronomical compensatory damages claim. The bank has already got, you know, this claim for 1.9 billion. And so is this really the case where we add on to that?

We give the jury the opportunity to go further only if the plaintiffs have proven that. And we saw precious little evidence in this trial, I would say none, to support any evidence of maliciousness, of intentional or willful failure to do something to harm other people, to show deliberate disregard. It just simply is not a punitive damages case. You have a gatekeeper role, and that claim should not go to the jury.

And then my last point is if you are going to impose punitive damages -- and we can go to the next slide

on this -- if you are going to impose punitive damages on a corporation, you need to show that -- one of these elements, and it means that the corporation itself was committed to this maliciousness and deliberate disregard.

None of these elements are proven, that the principal, if that's M&I, authorized some kind of malicious conduct or had somebody who worked for the bank that was unfit and disregarded the high probability that the agent was unfit.

The only thing that you saw in this trial from management of the bank was the video from the president who stood behind the AML program, who instructed the employees of the bank to take it seriously.

And the corporate policies were in place. They had devoted resources to AML analysts, not that an AML or Bank Secrecy Act violation would even give rise to a claim. There are no claims in this case under these regulatory statutes. There is no private cause of action for that.

But the only thing you saw from management in this case was proper and appropriate policies and guidance to the employees to follow the procedures which -- for which they are now being criticized.

So on these bases -- we will reserve time for our other arguments -- but based on the lack of evidence and the statements that plaintiff and his counsel have decided to

make in this case, these claims should all be dismissed. Thank you.

THE COURT: Thank you, Counsel.

MR. MARDER: Good morning, Your Honor.

THE COURT: Good morning.

MR. MARDER: David Marder appearing once again for the plaintiff. Your Honor, we've got a lot of briefing that's been in front of you. I'm sure you've --

THE COURT: Really?

MR. MARDER: -- read it and you have seen enough of it.

THE COURT: I have.

MR. MARDER: So I am going to restrict my comments to the three things that Mr. Moheban raised, knowledge, claim 2, and punitive damages, and rely on our briefing for the rest.

Before I get to that, it bears reminding what the standard is on JMOL, and it's an extremely exacting standard. You have to find that no reasonable juror could return a verdict for the plaintiff. You have to draw all reasonable inferences in our favor. And where state of mind is at issue, as it is here, the key issue in the case, court after court has said that JMOL is rarely appropriate when state of mind is at issue. And, most importantly, to the extent there are any conflicts in the testimony, you have to

assume that they're all resolved in our favor.

I'd like to go first, Your Honor, to this notion that we withdrew our claim of actual knowledge. And in this instance, Your Honor, on both occasions, on both of the things that Mr. Moheban pointed to, he looks at half of what the plaintiff said, ignores the other half.

I would like to first -- if we could go to slide 3, this is the language that they keep relying on where they contend that we withdrew the knowledge claim. And what it says is -- the question was: "Whether they testified or not, are you claiming that any M&I employee took a bribe or was a participant who knew that the Ponzi scheme was going on?"

They ignore the whole first half of the question and pretend that the witness said that they're not contending that we knew -- that anyone knew there was a Ponzi scheme going on. The preface to the question was limited only to people who either took a bribe or were participants.

It is not our allegation here -- well, setting aside what other inferences might arise from the destruction of documents, we haven't put into evidence any bribes.

And with regard to the participant, it's clear what we're talking about here is the fact that we're not

claiming that anybody at the bank participated in the scheme in the sense that they went out and solicited investors or anything of that nature. And we make this very clear in our brief, where they also ignore half of what we said.

And with that, Your Honor, I would refer you to page 4 of our opposition brief, which only quotes half of what we said there. If you look at page 4, we did, in fact, say, relying on this language here, that we were not alleging that any BMO employee participated or was a co-conspirator in the scheme, and we made clear when we were saying that that we were talking about people who were like the PCI officers who actually solicited investors.

And then the very next sentence says, (As read) "Rather, plaintiff contends that BMO allowed wires and checks to be drawn (MUFA Count I) and 'substantially assisted or encouraged' the fraud and breaches of fiduciary duty through banking services that they provided."

In other words, Your Honor, what we are saying is we're not claiming and we don't have to claim that they were a participant in the fraud. What we have to establish is that they substantially assisted in the fraud, which is very different from being an actual participant in the fraud.

So, Your Honor, I just wanted to start with that and dispel that notion that somehow we had agreed that we weren't alleging knowledge or that we have withdrawn that

from the case.

Our statement was very narrowly and very particularly drawn to those employees who either took a bribe or participated in the scheme in the sense that they went out and solicited investors.

So moving on, then, Your Honor, I think it's very important for everyone to understand what the actual standards are that are applicable to these causes of action.

Mr. Moheban suggested that what we were arguing was a negligence standard. And, Your Honor, nothing could be further from the truth. There are two groups of causes of action that we need to look at. We need to look at the MUFA claim, and then we need to look at all the other claims.

If we could go to slide 1, please, this is the MUFA statute. And it says we have to prove one of two things, either that the bank paid the check with actual knowledge or with knowledge of such facts that its action in paying the check amounts to bad faith.

There is a key case in the state of Minnesota, which is dispositive in this action, that discusses exactly what is meant by this language, and I would like to draw your attention, Your Honor, to the language in that case, and that's the second slide.

This is the Court of Appeals, the State of

Minnesota, and they're talking exactly about what the standard is for bad faith under MUFA. And they say, "Even where the bank does not actually conspire with the fiduciary," which is -- again, we're not saying they're participants -- "its indifference may constitute bad faith under particular circumstances." And then it cites with approval this case from New Jersey that says bad faith could be a reckless disregard or purposeful obliviousness of the known facts.

So here, Your Honor, we have the dispositive law from the State of Minnesota saying that bad faith under MUFA can be established by a reckless disregard or purposeful obliviousness of the known facts, which is exactly what we have proven here.

THE COURT: What am I to make of the flags that are accompanying those statements?

MR. MARDER: I'm not sure, Your Honor. I think that's just a relic of the printout. The flags give you further history on those cases, I think. I'm not sure.

THE COURT: So the yellow flag doesn't mean it's questionable as to whether that is still good law, and a red flag doesn't mean that it has been challenged by another case?

MR. MARDER: I think, Your Honor, yellow flags mean you look at the -- you need to -- it's possibly being

questioned, and a red flag is more of a questioning.

But I'm not aware of any cases postdating *McCartney* that limit this principle. There is a case, the *Buffets* case, which is cited by the defendants, and in that case they do talk about *McCartney* and they do say that a bank's toleration of overdrafts doesn't amount to bad faith unless it's a designated fiduciary account.

So that is the only case I am aware of that casts any doubt on this, but, again, that's very limited to situations where the plaintiff is alleging these overdrafts. Those are the only cases I'm aware of that -- only case I'm aware of that even addresses this principle from our research.

Your Honor, the next point I would like to go to is the other group -- and you can take that slide down -- the other group of causes of action, which is the non-MUFA causes of action, specifically aiding and abetting.

And there's two principles that I want to make sure are in mind. The first is that actual knowledge can be established by circumstantial evidence. That is a key point. The second one, Your Honor, is that actual knowledge can be satisfied by willful blindness, and this is an absolutely key point that I want to make sure comes across.

The defendants cite the *State vs. Thowl* case, saying that Minnesota had questioned the applicability of

willful blindness. But, Your Honor -- and this is the most important thing I have to say today -- the Supreme Court of the United States looked at this issue. That's the *Global-Tech* case. And the Supreme Court of the United States, looking at a cause of action that addressed actual knowledge, specifically said that willful blindness satisfies actual knowledge.

And lest someone argue that that case is not dispositive because it's talking about federal law, there was a case in Minnesota, which was considered after the *State vs. Thowl* case, and in that case the court -- which is *Ariola vs. Stillwater*, which we have cited in our papers -- in that case the State of Minnesota cited with approval the *Global-Tech* case as the standard for willful blindness as is applied to an actual knowledge cause of action.

Now, in that case the court did say that the plaintiff there had not established willful blindness, but it cites the *Global* -- the Supreme Court case of *Global-Tech* and it follows the Supreme Court case of *Global-Tech* as to what willful blindness is.

So, Your Honor, we strongly urge that the Court consider that law, specifically the fact that the most recent statement about this from the State of Minnesota, the *Ariola* case, specifically incorporates the *Global-Tech* standard from the Supreme Court of the United States that

says that willful blindness equals actual knowledge.

And, Your Honor, even if you aren't willing to go that far, and we do urge you to go that far, but even if you're not, even in the jury instructions that you submitted last night, the draft jury instructions, you specifically said and cited a case that willful knowledge could be a mechanism for inferring knowledge. So at a bare minimum, willful knowledge is relevant because it's a mechanism for inferring knowledge.

Now, with that, Your Honor, I will go to the evidence that we put forth that establishes the requisite standard of knowledge, and that evidence was overwhelming. But before I get there, we need to look at the adverse inference, because in this case there was a destruction of documents and you're going to give an adverse inference instruction.

And because of that instruction, this jury, they can infer facts from those missing documents. All of the missing evidence that the plaintiff -- that the defendant claims is missing, no evidence of bribes, no evidence of actual knowledge, the jury can infer that all that was in the documents that were destroyed.

Certainly, Your Honor, if we were relying on that alone, that might be problematic, but the plaintiff offered a variable avalanche of evidence, an avalanche of evidence

that was circumstantial evidence of knowledge.

We submitted evidence from the business bankers, specifically both of them, that they knew that they had to understand the accounts and that they were trained to detect unusual and suspicious activity and that they had complete access to the account activity. And the evidence shows that they were certainly willfully blind.

Mr. Flynn never even bothered to review the account statements showing that billions of dollars had gone through the accounts, didn't see retailers wiring money in even though he knew that that was the business model.

He knew that PCI had refused to give financial information to the bank even though they were a longstanding customer.

He never pitched the idea of BMO lending money to PCI's businesses even though he testified that's how they made their money, which is highly relevant to his mental state.

And, finally, Your Honor, was the sham DACA agreement, which was highly unusual. He had never done it before. He worked with a felon's lawyer, who happened to be the same money launderer who had introduced PCI to him back in 2002, and knew that it was a sham agreement because he never got any type of transaction list, didn't ask for any compensation, and never set forth any procedures to follow

up on that.

So that there, Your Honor, is strong evidence -- circumstantial evidence of knowledge and it's evidence of willful blindness.

Similarly, Your Honor, we put in evidence relating to Mr. Jambor. Mr. Jambor actually did access the account. He accessed it many times and saw billions of dollars flowing through, all in suspicious pattern, same-sized ingoing, outgoing payments and round numbers. He saw all that and didn't do anything about it. Again, strong evidence of willful blindness, which even under your standards, Your Honor, that you articulated is -- the jury can infer fraud from.

He knew that there were no retailer payments going in. He knew -- and this is not circumstantial evidence -- he knew about Deanna Coleman's million dollar checks coming out of that account and was told by Mr. Petters that they were for a house, even though this was not a payroll account and no taxes were coming out.

He was involved in exceptions to the overdraft policy. He allowed Ms. Coleman to ghostwrite letters for him, which is an extraordinary thing. He knew about the DACA requests. And he knew the fact that Mr. Petters was planning to use a small business checking account to transmit billions of dollars to acquire a company, all of

which was extremely out of the ordinary.

And, finally, Your Honor, with respect to knowledge evidence, we have the AML analysts, and I don't want to go through that evidence in detail. We talked about it. But Ms. Ghiglieri testified in detail about how everything they did was ignoring suspicious activity, and they engaged in a whole host of atypical practices.

And lest there be any doubt, afterwards they decided to file a SAR. And in that recommendation, they relied on the very same evidence that they had before. Clear evidence, Your Honor, of closing their eyes and willful blindness.

So it is clear that our evidence satisfies the standard. One strong piece of circumstantial evidence is atypical banking practices, and we have a litany of evidence establishing that these banking practices were atypical, and that, the courts have held, is strong circumstantial evidence of knowledge.

Also, Your Honor, and I want to emphasize this, we are not merely alleging that there were red flags that were ignored. This case is much stronger than that. What we are alleging is that the employees saw the red flags and investigated. And when they saw the ugly truth, they turned the other way.

That is evident multiple times. It's evident with

Mr. Jambor failing to follow up on the checks. It's evident every time one of the analysts looked at the 38 alarms that went off in the money laundering system and turned a blind eye each time.

Mr. Moheban referred to some self-serving testimony by the people involved saying that they did not have knowledge, but, Your Honor, on JMOL, as we've said, you have to assume that the evidence -- the conflicts in the evidence are resolved in our favor.

Setting aside the testimony, the other sort of gotcha argument they have, Your Honor, is this argument relating to Rule 608.

And if we could please put up slide 10. This is Rule 608, and it talks about when you open the door to a witness's character for truthfulness. And what it says is it's when the witness's credibility has been attacked.

And there is a whole extensive library of evidence -- I'm sorry, of case law that addresses when that happens, and it has to do with whether you're attacking the veracity of the witness's account of the facts in a specific case or the witness's veracity in general.

If you look at the actual interaction that happened at sidebar -- and we have it here, Your Honor, it's slide 11 -- what Mr. Gleeson was arguing was that because Christopher Flynn was the person who was accused of editing

the MIContact report, of destroying the document, that under 608 we had put his character into evidence. And Mr. Lawrence, if you look on the next page, contests that and says that under the rules we have not opened the door to this type of character evidence because of that.

So this was a very narrow assertion, and the defendants try to expand that and claim that he was arguing more broadly that we didn't -- we were not asserting that he acted in bad faith under MUFA or that he acted with knowledge under the aiding and abetting counts.

But, Your Honor, it is impossible, it is literally impossible that Mr. Lawrence could have been making that argument. And the reason is that under Rule 608, it does not depend on whether the underlying claims involved dishonesty. Even in a fraud case, if you accuse somebody of fraud, it doesn't open the door to this kind of evidence because it's not the conduct -- underlying conduct in the case. So Mr. Lawrence could not possibly have been making that argument.

So with that, Your Honor, I would like to move now -- since we've addressed all the knowledge issues, I would like to move to the MUFA claim, which is the assertion by the defendants that there are no duties in the DACA other than -- they say there are no duties other than the specific obligations that are undertaken in the DACA.

But, Your Honor, the Court -- Bankruptcy Court specifically looked at this and held there were at least two references in that agreement that the defendant would hold funds for the benefit of PCI. And the Court concludes, therefore, that our allegations supported -- that our allegations support an allegation that there were fiduciary duties set forth in the agreement.

They also point to language about holding funds for the benefit of in other paragraphs. But if you look at the motion to dismiss order that came out of the Bankruptcy Court, they specifically examined this issue and said that this agreement gave rise to fiduciary obligations in general and therefore this notion that there was very limited duties is simply false and has been found to be false by the District Court.

Your Honor, I'm going to skip over punitive damages because I think we've addressed that adequately in our papers and I just want to touch on now, in the time I have left --

(Plaintiff's counsel confer)

MR. MARDER: And I'm told I only have ten minutes left, so I am going to do this relatively briefly. This has to do with our motion for JMOL.

There are a whole host of defenses set forth in the defendant's papers, most of which I'm going to skip over

because it's clear that they're not affirmative defenses at all, and the defendants haven't even contested that. They just say we reserve the right to argue these legal principles, but they contest that they are not legal defenses -- or affirmative defenses.

So, with that, I really want to focus on a couple of them. One I want to focus on most heavily is the statute of limitations. The standard we all know, Your Honor, is that for the statute of limitations to be a problem, they would have to prove that there was compensable damages that occurred within the statute.

And our expert, Mr. Martens, which you need to credit in the context of a JMOL, was that no investors lost money until the promissory notes that were executed in -- on December 5th, 2007 came due.

Now, these notes were 120 days long, according to the testimony. So we are looking at April of 2008 before anybody didn't get paid. And the trustee wasn't even appointed until shortly thereafter, and the case was filed within the six years. So it is clear that we have satisfied the statute of limitations.

So what do the defendants say? The defendants say that Mr. Jarek testified that PCI was insolvent from a balance sheet perspective by 1996, and then they equate insolvency with an inability to pay debts.

Your Honor, for a number of reasons, this argument makes absolutely no sense. The first one is when you're talking about a Ponzi scheme, these concepts of insolvency aren't even applicable, and our expert so testified. A much more reasonable definition, which you find in the case law, is insolvency is the inability to pay bills when due.

But regardless of how you define insolvency, the question is not whether they were insolvent. The question is when were they unable to pay investors, because that's the basis of our harm.

Mr. Jarek gave various earlier dates showing that there were investor losses prior to -- going back beyond the six years, but when pressed on cross-examination, he admitted that those were the losses that investors would have suffered if the scheme had fallen apart earlier.

But, Your Honor, it didn't fall apart earlier. Even Mr. Jarek agreed that they were able to go out and get new investors to pay the old investors, and it wasn't until December 5th, 2007 that there were any investors who weren't either paid or agreed to roll their notes. Mr. Jarek specifically admitted that.

And he specifically admitted that these earlier losses he indicated were only losses that would have surfaced if, and, again, if the scheme had fallen apart, which it did not. So it's very clear that there were no

compensable damage here any time before the -- any time before the scheme fell apart.

I would like to save the rest of the time I have for rebuttal, Your Honor. So with regard to the other affirmative defenses, I'm just going to rely on our papers.

THE COURT: Thank you, Counsel.

MR. MOHEBAN: Your Honor, I'll finish up on our motion and then let Mr. Gants address the affirmative defenses.

We've talked a lot about ignoring red flags in this case. And Mr. Marder, as you pointed out, ignored a big red flag about his *McCartney* case. It's an unpublished decision. So for Mr. Marder to come up here and declare that as dispositive law, which is what he said, is just simply wrong.

And I have a little bit of déjà vu, I have to say, because ten years ago I was arguing about *McCartney* in front of Judge Frank when I argued the *Buffets* case. They made all the same arguments about *McCartney*. Judge Frank granted summary judgment. Judge Colloton affirmed it at the Eighth Circuit.

McCartney is not the law. *Rheinberger* is the law, and *Rheinberger* says that bad faith does not exist if the bank was acting honestly. So this whole attempt to open the door with *McCartney* should be rejected. It's an unpublished

decision. It should not be relied on to contradict *Rheinberger*.

If we can go back to the slides, I would like to go to the very last slide, which has to do with this notion of willful blindness. So this is not the law in Minnesota. Counsel sort of danced around that.

But the cases that we cited on actual knowledge -- and I think the Court understands this based on the jury instructions that we've seen -- the cases do not say willful blindness, MUFA does not say willful blindness, no Minnesota case applies willful blindness to the claims in this case. And cases like *Zayed*, which is just like this case, enforce that actual knowledge means what it says, actual knowledge, not constructive knowledge, not willful blindness.

The one case that they have, this *Ariola* case, is not, again, any of the claims that are at issue here. It's a wrongful death case. It's not controlling. It's just one battle at the Minnesota Court of Appeals.

It's dicta because the court ultimately found there was no evidence of willful blindness, so it never even actually applied the standard that it talked about. And it referenced this U.S. Supreme Court case, *Global-Tech*, but it didn't cite any Minnesota authority to support that dicta.

So as you well know, probably better than anyone, having been in the Minnesota Appellate Courts, this is not

the court that creates new Minnesota law. That's for the Minnesota Supreme Court to decide. And so willful blindness is not the standard.

I want to mention on the adverse inference point, I mean, I think we've covered that in terms of what they've already told to the jury, but let's keep in mind the allegations of spoliation have to do with e-mails prior to two thousand -- March of 2005.

On this breach of fiduciary duty claim, all of those communications took place in 2008. There's no missing documents relating to the DACAs. So they can't use that as a lever on that claim. And, of course, they've already disclaimed the notion that they were making a claim as to actual knowledge on the other claims.

The reference to the Bankruptcy Court's decision, of course, that was just a motion to dismiss, and the language of that is clear that the court was just finding we're not going to dismiss the claim. It didn't -- now we've had a trial, now we know what the evidence is, so that's not controlling on that issue at all.

And then lastly I'll just say -- so I pressed counsel: Where is the evidence? You know, didn't you concede that you're not claiming actual knowledge? And so he then cites the rest of their quote, right?

I quoted the part about how we're not contending

that the BMO employees participated or were co-conspirators. Let's give them the rest of their quote. It doesn't allege actual knowledge. It says that BMO allowed wires and checks to be drawn.

Well, banks allow wires and checks to be drawn every day. We saw the evidence. These are automated transactions. People with checking accounts write the checks they want to write. To allow that doesn't mean actual knowledge.

And then he just repeats the allegation; we're alleging that the bank substantially assisted or encouraged the fraud. But, again, they don't -- that's an allegation, but they don't support it with any evidence.

So I don't think that they -- all the list of things that Mr. Marder read to you, none of those were evidence of actual knowledge. They were just random facts about things that happened in the bank account.

So at this point I'll turn the matter over to Mr. Gants to address the affirmative defenses.

THE COURT: Thank you, Counsel.

MR. GANTS: Good morning, Your Honor. Brendan Gants of Munger, Tolles & Olson on behalf of BMO Harris Bank.

THE COURT: Good morning.

MR. GANTS: I'll keep any comments brief and

addressed largely to the points raised in the reply brief that was filed on the affirmative defenses. And I want to start with the statute of limitations, which is what plaintiff's counsel discussed when he argued these defenses.

As to the applicability of this affirmative defense, Your Honor, the relevant facts are largely undisputed. Plaintiff does not dispute that PCI was insolvent by at least 1996 and that it remained insolvent in that it was unable to repay investors because its debts were greater than its assets until the scheme was shut down in 2008.

In his reply brief, the plaintiff tries to relabel the basic concept of insolvency as balance sheet insolvency and apparently argues that PCI was not actually harmed by the Ponzi scheme until it was shut down. Your Honor, that argument is fundamentally contrary to the theory on which plaintiff has been permitted throughout this case to maintain claims on behalf of PCI in at least two ways.

First, the notion that no damages accrued until particular investors could not be repaid particular amounts that they were owed could only make sense if the plaintiff were permitted to stand in the shoes of the investors themselves, which he is not.

Plaintiff's theory has been that PCI was harmed by its insolvency and inability to repay creditors. That's the

language from *Greenpond* that they have relied on. In other words, it was harmed by taking on unpayable debt.

Now, PCI was able to pay back certain notes over the time period, but it was able to do that only by taking on more unpayable debt. So if the harm to PCI consisted of taking on a debt the company could not repay, that occurred every time PCI took on a new note and at that time, under plaintiff's theory, the compensable damage to PCI would be the amount that PCI was not able to repay.

If the scheme had been shut down earlier, then different investors might have been harmed or they might have been harmed in different amounts, but that has nothing to do with PCI's injury as they've framed it throughout the case.

Second, this argument is directly contrary to plaintiff's causation argument and really to his entire theory of the case. Plaintiff's counsel has argued and plaintiff himself testified that M&I caused harm to PCI because it should have, but didn't report people to the feds, in plaintiff's words, and let people know that PCI was running a Ponzi scheme.

They've said that if M&I would have done things differently, the FBI would have shown up at PCI's door. But there's no dispute that if the FBI had done that at any point, then investors would not have gotten repaid because

PCI was insolvent.

Now they say because PCI was able to keep getting new investor funds to pay old investors until 2008, then PCI wasn't actually harmed until 2008. But if that's the case, then PCI's damages would not be caused by what M&I failed to do, but by what plaintiff's argue M&I should have done.

In other words, according to this theory that they've advanced solely on the statute of limitations argument, the source of PCI's damages is that someone did go to the feds and let people know about the Ponzi scheme, which made it unable to repay the investors.

Plaintiff can't have it both ways. It can't be the case that he can pursue claims against M&I for allegedly causing PCI's inability to repay investors by hiding the Ponzi scheme and at the same time argue for statute of limitations purposes that the Ponzi scheme being revealed is what caused PCI's injury.

The only other argument that plaintiff raises in his reply brief on the statute of limitations is about fraudulent concealment, so I want to address that briefly. And as to the statute of limitations, he raises that fraudulent concealment issue only as to Count III, the aiding and abetting fraud claim.

But, Your Honor, fraudulent concealment does not apply to that claim or to any other claim when it comes to

the statute of limitations because, as trustee, plaintiff stands in the shoes of PCI and is deemed to have knowledge if PCI had knowledge, including for statute of limitations purposes.

Now, we understand that the Court has drawn a distinction throughout this case, which plaintiff's reply brief ignores, between legal defenses and equitable defenses.

If we go all the way back to the summary judgment decision that's Docket Number 70, the Court noted, quote, A trustee's ability to assert causes of action on behalf of the bankrupt estate is subject to any equitable or legal defenses that could have been raised against the debtor. That's from *Grassmueck*.

The Court then went on to determine that under Minnesota law, the receivership would defeat the application of equitable defenses in this case. So we understand that Your Honor has made that determination as to the equitable defenses, and we've preserved our arguments on that.

But that argument does not -- or that ruling does not apply to the legal defenses. A statute of limitations is a legal defense. And more than that, it's a rule imposed by the Minnesota legislature that limits the pursuable claims.

So if plaintiff could pursue claims on behalf of

the estate that would have been unavailable to the debtor because of the statute of limitations, he would thereby succeed to greater rights than the debtor possessed, which is not allowed under bankruptcy law.

That argument, Your Honor, about the distinction between legal and equitable defenses is relevant to several of the other affirmative defenses that we've raised as well, and I want to touch on just a few of those briefly.

One is consent and ratification. Again, these are legal defenses, not equitable defenses. The plaintiff doesn't dispute that. The reply brief only cites two cases, *German America Finance Corp.* and *Magnusson*. And those cases involved assertions of equitable defenses against receivers, and they rejected those defenses, those equitable defenses against receivers.

Plaintiff's argument is that in doing so, the courts did not specifically draw a distinction with other defenses, legal defenses, but those defenses were not at issue in those cases. And so the fact that the court did not choose to comment on the issues not before it is not only dicta, it's the weakest possible dicta.

I'll move on because those were the only arguments raised in the reply brief on consent and ratification. I'll move to the UCC displacement issue.

The plaintiff contends in their reply brief that

UCC Section 3-307 is narrow, but he cannot deny that it was adopted to, quote, comprehensively cover the issue of when the taker of an instrument has notice of a breach of fiduciary duty. That language comes directly from Section 3-307 itself, Comment 1.

Plaintiff tries to characterize his claims to get around that language by saying at page 9 of their reply brief that his claims are based on BMO's conduct -- this is a quote -- BMO's conduct in willfully ignoring obvious insider payments, unquote.

But that proves our point. In the normal course, a company is allowed to make obvious insider payments to its officers using its own checking account. Plaintiff's contention that M&I is liable for allowing PCI to do so, therefore, necessarily depends on the contention that M&I had notice of a breach of fiduciary duty. That's an element of claims 1 and 4, and that is what Section 3-307 comprehensively covers.

Your Honor, the only Minnesota law authority, as both parties have recognized here, is *Bradley*, and *Bradley* relied on guidance from the Minnesota Supreme Court. The plaintiffs attempted in reply to relitigate the issues the parties addressed in *Bradley*, but we respectfully submit the Court of Appeal's resolution of those issues was thorough and well-reasoned and it remains the best evidence of

Minnesota law on the issue.

The last issue I will touch on very briefly is the contract limitations period. Again, this issue -- this defense also implicates the argument that I discussed earlier about the distinction between legal and equitable defenses, and this is a legal defense which defeats some of their arguments in their reply brief.

They also assert in their reply brief that the arguments are void because both parties supposedly entered into them with intent to defraud. But plaintiff points to no evidence that either party had that intent.

As we argued, PCI cannot be considered both a victim of the transaction and a defrauding party in it, as plaintiff has suggested. And the suggestion that M&I entered into that agreement with intent to defraud is simply not supported by any facts.

As to the other affirmative defenses and the other arguments in our papers, we'll rely on those papers, Your Honor. Thank you.

THE COURT: Thank you, Counsel.

MR. MARDER: Your Honor, I'm just going to briefly rebut what we just heard from the two counsel for the defendant.

First one, some comments made by Mr. Moheban, which is he cites earlier Supreme Court opinions saying the

ultimate issue on the MUFA statute is honesty. But, Your Honor, that is not inconsistent with the *McCartney* case that we cited. That case holds that when considering honesty, you may consider whether there was a reckless disregard or purposeful obviousness to facts, and that's what we're relying on that opinion for.

The second point he made is the spoliation in this case only relates to pre-2005 e-mails. That also is irrelevant. First of all, the e-mails weren't the only part of the documents that were destructed. It was also the attachments to the e-mails. And whether they were before or after 2005, the jury can still assume and presume that those e-mails contained evidence of knowledge.

The final point he made, Your Honor, that I want to contest is that in our brief we didn't address this issue of actual knowledge in the second sentence I read. The second sentence I read did talk about substantial assistance, and the reason it did is because we were defining what we had meant in this question by what is a participant. We were clarifying that when we said that we weren't alleging that participants knew is very different from saying that people who substantially assisted knew. So that was the purpose of that sentence in the brief, and it makes that perfectly clear.

Going now to the arguments on -- that were

asserted with regard to our JMOL argument, the first argument that was made related to the statute of limitations and that there was some kind of notion that what we were arguing was inconsistent with our damages model.

And, Your Honor, I must emphasize that it certainly was not. Our damages model is and always has been that the -- PCI was injured by virtue of being left unable to pay its creditors.

Prior to December 5th, 2007 and then the 120-day period on top of that, there is zero evidence in this case that any investor was unable to be repaid, although they were repaid with other investors' funds. That is the very nature of a Ponzi scheme, and that has always been our argument since day one and it is the damages measure that this Court has adopted since day one.

The next argument I would like to assert is the one that relates to causation. The defendants argue that we have not established causation. And to be perfectly frank, Your Honor, I'm not even sure I understand the argument.

We have established, in great detail, the nature of our causation case. The nature of our causation case is that the defendants substantially assisted with the scheme from day one. They were the only bank who was willing to turn a blind eye. The evidence showed that.

And had they not done that, this scheme would have

been shut down and these damages would not have occurred. We know what would have happened had they identified this to the police.

And how do we know that? We saw Ms. Coleman on the stand. And when Ms. Coleman got on that stand, she said that when she went to the FBI, she went back that very same night wearing a wire to record Mr. Petters' concept -- conversations. That's how fast the FBI acted. And had they done their job, the scheme would have been shut down much earlier.

Next, Your Honor, I would like to deal with this notion that -- several notions that were argued with regard to this defense of consent and ratification. And there are two different issues that need to be considered when looking at that defense. The first is whose knowledge we're looking at, and the second is whether the Court should even consider that person's knowledge.

With respect to the first one, we submit, Your Honor, that the person whose knowledge you would have to look at is Mr. Kelley's, not the underlying people at PCI. And the reason we know that, Your Honor, is the exact case law that you cited in connection with the -- just give me one moment to grab that citation.

(Pause)

MR. MARDER: The case law that you cited -- and

what I would like to do is put up slide 15, if I could. You cited in your opinion when you denied them the right to move for summary judgment the relevant case law. It's the *Magnusson* case and the *German American Financial Corp.* case and you quoted that language there, which is the rule in Minnesota.

And what it says is that the receiver of an insolvent corporation has no greater rights than the corporation itself, but with respect to defenses, it's equally true that when there's a fraud on the rights of the creditors, that the receiver is not subject to those defenses.

That language that you quoted, Your Honor, although it's in the context of an argument relating to affirmative defenses, applies to all defenses if you look at the language of it. That's the language from Minnesota, and that language is broad enough to encompass not only equitable defenses, but all defenses.

The second thing that they ignore, Your Honor, is the case law that you relied upon in the jury instructions -- it's the *Steigerwalt* line of cases -- which says that they cannot rely on the *mens rea* of people who were complicit in the fraud.

And in this instance, they're trying to contest and address the issue of the statute of limitations by

looking at the knowledge of Mr. Petters and Ms. Coleman, the two people who were complicitous in the fraud, and that is improper under that line of cases.

With the time I have left, Your Honor, I would like to very briefly address the UCC. We have briefed that exhaustively, Your Honor, and I don't want to subject you to any more argument.

The key take-home point there, Your Honor, is that the UCC provisions are geared to very particular types of causes of action. We cited in our briefs the controlling case law on the wire transfers, which is 99 percent of the damages that are at issue here, where the court in Minnesota stated that these types of cause of action that don't arise out of the processing of the transaction are simply not preempted by the UCC -- I'm sorry, yeah, by the UCC.

Similarly, with the check transactions, the defendants do cite case law that says that there is a preemption for certain types of claims, I believe it was a breach of contract claim and a negligence claim that had to do with processing the checks.

And, again, this case doesn't arise out of who is a holder in due course or who properly processed a check. This case arises out of fraud that was perpetrated in this case and the defendant's willful blindness in failing to stop that fraud.

Finally, Your Honor, the last thing I would like to address is these alleged contractual limitations. You'll notice that the defendants argued this issue of whether they were void or not, but studiously avoided our two strongest arguments.

The one is that when these are properly construed, both of these agreements are limited to very particular types of notice that had to be given for very particular type of account problems. And we've addressed that in our brief, Your Honor, and I won't belabor that point.

More importantly, Your Honor, is that both of those agreements are unenforceable because if they were enforced, they would completely abrogate our right to bring any cause of action whatsoever.

These cases could not have accrued, as we've said in our statute of limitations argument, until there were actual losses. And these would have caused us to lose our causes of action well before the statute of limitations would have accrued.

And under the law of Minnesota, again, Your Honor, these types of agreements are strictly construed and they are unenforceable if they are unreasonable. And under the case law, they are unreasonable if they ameliorate your cause of action even before you are able to bring it.

So with that, Your Honor, unless there are further

questions, that addresses our rebuttal. Thank you, Your Honor.

THE COURT: Thank you, Counsel.

MR. MOHEBAN: Your Honor, I think you have heard enough, you've got it, and so we are not going to ask for any more argument.

THE COURT: Thank you, Counsel. I will take the matters under advisement and appreciate your judgment as to whether to provide additional argument.

I will compliment counsel for both parties. Your briefing, so your written submissions, as well as the arguments today are very thorough and very fact and law bound and very helpful to the Court. So I appreciate the quality of the lawyering that I have had the benefit of receiving in this case. Thank you.

MR. MARDER: Thank you, Your Honor.

MR. GLEESON: Good morning, Your Honor. John Gleeson for BMO Harris Bank.

Before we break for lunch, there's a joint application of the parties on which we'd like your blessing, which is to enlarge the amount of time for each side's summation to 75 minutes from 60. Because it's joint, we hope we can just get your blessing right off the bat. If not, we could go into why that's necessary, but let me await the instruction.

THE COURT: I always appreciate the why.

MR. GLEESON: You know, it's remarkable, Your Honor, you had a 12-trial-day trial, but you have got a 3,500-page record, which is a testament to how well you can move a trial. We sort of had three trials: One is AML. One is business bankers. Another is spoliation related.

And I think without -- I didn't elaborate with Mr. Marder on the plaintiff's side reasoning for this joint request, but I'll bet it's the same as our reasoning, which is there's so much going on in this case.

And even with 75 minutes, which we ask for, I'll speak for myself, with some trepidation because we know how you like to move the case, but even with 75 minutes, it's very difficult to sum up all the pieces of this case. There's a lot of exhibits in evidence. There was a ton of testimony. It's a trial that had a duration that is masked by how quickly you moved it along.

So for all of those reasons, we really need it, and maybe I can invite my colleague across the bar to come up and join me in that request because we discussed it earlier today.

MR. MARDER: Your Honor, I wish I was as articulate as Mr. Gleeson. I think he has already articulated the position. We agree.

THE COURT: That matter is taken under advisement.

MR. GLEESON: Thank you, Your Honor.

THE COURT: Thank you. I do appreciate the complexity of the issues and I appreciate the arguments that you made -- you are making about why it might be fruitful to expand the amount of time for argument, and I will seriously consider your request.

MR. GLEESON: Thank you.

THE COURT: Is there anything further before the Court?

MR. MARDER: Nothing further from us, Your Honor.

MR. MOHEBAN: No, Your Honor.

THE COURT: Thank you, Counsel.

LAW CLERK: All rise.

(Lunch recess taken at 11:42 a.m.)

* * * * *

(1:07 p.m.)

IN OPEN COURT

(JURY NOT PRESENT)

THE COURT: So we are here for a charge conference now in this matter. And as the process that we've used in this case, I e-mailed the parties copies of the Court's proposed final jury instructions and verdict form for today's charge conference. I will file these drafts on ECF at a later time so they will be made a part of the record.

I prepared these drafts after careful

consideration of the parties' proposed jury instructions and arguments. If either party proposed an instruction that's not included in the charge conference draft, that is because I either sustained an objection to the proposal or I have rejected the proposal.

If either party objected to a proposed instruction it is -- that is included in the charge conference draft, that's because I have -- sorry, that's not included in the charge conference draft, that's because I overruled the objection.

Pursuant to -- let me just say that again. If either party objected to a proposed instruction that is included in this charge conference draft, that's because I have overruled the objection.

And also pursuant to our Federal Rule of Civil Procedure 51(b)(2), I will now give the parties an opportunity to object on the record to the inclusion, content, or exclusion of particular instructions.

I'll follow my standard practice by going through the charge conference draft instructions one by one and allow the parties to succinctly note their objections or nonobjections on the record. And although you may renew previously overruled objections for preservation purposes, you should not use this as an opportunity to extensively re-argue issues that have already been decided.

My hope and intention is that we will be complete -- have completed this in an hour. So let's move on to the charge conference.

Jury Instruction 1, any objection?

MR. MOHEBAN: Defense has no objection to Instruction Number 1.

MR. MARDER: We have no objection to Number 1, Your Honor.

Just for clarification, is it okay if we just go from our seats here so we don't --

THE COURT: Yes, please.

MR. MARDER: -- have to go back and forth from the podium?

THE COURT: Thank you.

MR. MARDER: Thank you, Your Honor.

THE COURT: Jury Instruction Number 2, any objection?

MR. MARDER: We have no objection, Your Honor, for the plaintiff.

MR. MOHEBAN: Did you say Number 2?

THE COURT: Number 2. Sorry if you aren't hearing me.

MR. MOHEBAN: May I just ask a question about the form of all instructions? I understand that we are seeing them with authorities and footnotes, but am I correct that

the jury does not get the footnotes, so we don't have to make any objections as to that?

THE COURT: That is correct.

MR. MOHEBAN: We have no objection to Instruction Number 2.

THE COURT: Jury Instruction Number 3.

MR. MARDER: No objection for the plaintiff, Your Honor.

MR. MOHEBAN: No objection.

THE COURT: And I am fine if you remain seated --

MR. MARDER: Thank you, Your Honor.

THE COURT: -- unless you want to get your exercise.

Jury Instruction Number 4.

MR. MARDER: No objection for the plaintiff, Your Honor.

MR. MOHEBAN: We don't have an objection, but we do believe there are two exhibits that fall within the category that are not included, and those are DX-40495 and DX-50928. Those are summaries of the ACE Reports and summaries of policies and procedures.

MR. MARDER: Would you have a copy of those handy?

MR. MOHEBAN: Does anyone have a copy of them?

MS. MOMOH: I can send one electronically.

(Plaintiff's counsel confer)

MR. MARDER: Your Honor, we have no objection to adding those.

THE COURT: Okay. So those would be Exhibits?

MR. MOHEBAN: DX-40495 and DX-50928.

THE COURT: Okay. And they are summary charts, and so it would be in the summary charts paragraph --

MR. MOHEBAN: Correct.

THE COURT: -- of Jury Instruction 4?

MR. MOHEBAN: Correct.

THE COURT: In addition to -- or after 713?

MR. MOHEBAN: Correct.

THE COURT: Okay. Thank you, Counsel.

Jury Instruction Number 5.

MR. MARDER: No objection for the plaintiff, Your Honor.

MR. MOHEBAN: No objection.

THE COURT: Jury Instruction Number 6.

MR. MARDER: No objection for the plaintiff, Your Honor.

MR. MOHEBAN: No objection.

THE COURT: Jury Instruction Number 7.

MR. MARDER: No objection from the plaintiff, Your Honor.

MR. MOHEBAN: No objection.

THE COURT: Jury Instruction Number 8.

MR. MARDER: No objection for the plaintiff, Your Honor.

MR. MOHEBAN: No objection.

THE COURT: Jury Instruction Number 9.

MR. MARDER: Your Honor, for the plaintiff, we do object. And we'd just like to note for the record that we proposed an alternative instruction, which was Closing Instruction Number 3, and for preservation purposes we ask that that instruction be read in its entirety. And I understand Your Honor has already rejected that, but just for purposes of preserving the record, we wanted to say that.

But, more importantly, Your Honor, we wanted to address this instruction just in a little bit more detail, the reason being that it has to do with some of the evidence that came in at trial, and so we want to elaborate just on one point.

And here it is. On page 2 of the Bankruptcy Court order, the court ordered an adverse inference that the defendant intentionally destroyed and failed to preserve documents. On page 9 of your order, you summarized the Bankruptcy Court order and stated that the Bankruptcy Court had ordered precisely that sanction. And then you affirmed what the Bankruptcy Court order did on page 28 of your spoliation order.

So, Your Honor, we respectfully suggest that this instruction does not include the very sanction that the Bankruptcy Court ordered, and that you affirmed, and specifically an instruction that BMO intentionally destroyed Minnesota e-mail backup tapes.

So we would object to this request, but think the objection could be cured if there was a change to the request and it would say instead of "You have heard evidence that," it would read, "You are instructed that BMO intentionally destroyed Minnesota e-mail backup tapes that should have been preserved" in lieu of the first sentence. Then it would just go on, "You may," and as it is now.

But, Your Honor, without that instruction, this instruction would not include the very sanction that the Bankruptcy Court ordered and that you affirmed.

And I would be remiss, Your Honor, and with all due respect, I would suggest that what has happened to the plaintiff here is a bit unfair in that we went through a lengthy process in the Bankruptcy Court involving evidentiary hearings and briefing and the like and were given the sanction after we proved that they intentionally destroyed documents. During the trial they were given leave to rebut that, which they had the right to do, and we respect Your Honor's decision to allow them to do that.

But in us rebutting that, we couldn't put on our

full case because we were precluded from addressing the conduct of counsel, which half -- half of our spoliation case related to the conduct of counsel. So we had to try this with one hand tied behind our back.

And even with that, they weren't able to rebut the presumption. There was zero testimony relating to the second set of destruction, the six tapes that were found in 2014. They didn't rebut that in any way. There was no testimony whatsoever related to that.

So we're in a situation where the Bankruptcy Court ordered a sanction. You affirmed a sanction. That sanction is not present in the jury instruction. They were given an opportunity to rebut it, and they didn't rebut it.

And we weren't able to put in all the evidence that we needed. So we're left with a situation where we're not being able to receive either the sanction that we asked for or our ability to prove that documents were intentionally destroyed.

So for all those reasons, Your Honor -- and I apologize to belabor it, but it's very important to us and it does relate to what happened at the trial -- for that reason, we do object to this instruction.

THE COURT: Counsel?

MR. MOHEBAN: Your Honor, the defense does not object to the instruction in light of your prior rulings.

This Court clearly has the authority and discretion to determine how to instruct its jury.

And the instruction that you've provided in Instruction Number 9 is the exact instruction that you stated you would provide in your September 29th, 2022 order at page 10 in which you stated you would give a permissive adverse inference instruction. You are doing exactly what you said you were going to do before trial.

MR. MARDER: Nothing further, Your Honor.

THE COURT: The objection is overruled.

Jury Instruction 10.

MR. MARDER: Nothing from the plaintiff, Your Honor.

MR. MOHEBAN: Your Honor, our only observation on this is that it does not call out the punitive damages claim as having a different standard of proof, which is clear and convincing evidence. So it could be confusing to the jury that -- in contradiction to Instruction Number 25. And we think the potential for confusion can be eliminated by simply stating that this Instruction Number 10 does not apply to the punitive damages claim. We would request that modification.

MR. MARDER: Your Honor, the plaintiff's position would be that it's already addressed in the punitive damages section, so it doesn't need to be addressed here.

THE COURT: The objection is overruled.

Jury Instruction 11.

MR. MARDER: No objection from the plaintiff, Your Honor.

MR. MOHEBAN: Your Honor, again, our observation on Number 11 is that it identifies the claims by name, but it does not identify the affirmative defenses by name. So to put things on equal footing, we would just ask that the instruction be modified to refer to statute of limitations, consent, and ratification as being the affirmative defenses that are advanced by the defense.

MR. MARDER: Your Honor, the plaintiff has no objection to that clarification.

THE COURT: And do you have specific language that you wish to introduce?

MR. MOHEBAN: Yes, if I can -- at the last paragraph where it says, "In response to plaintiff's claims, BMO asserts," I would just say "the following affirmative defenses to liability," and then it could be a colon, and then it could say, "statute of limitations, consent, and ratification."

MR. MARDER: Plaintiff has no objection to that, Your Honor.

THE COURT: I didn't hear you.

MR. MARDER: Sorry. Plaintiff has no objection to

that.

THE COURT: Okay.

MR. MOHEBAN: Your Honor, may I have one moment just to confer with my colleagues on something?

THE COURT: You may.

(Defendant's counsel confer)

MR. MOHEBAN: Your Honor, what my colleagues have asked me to clarify, going back to Instruction Number 9, that when we say we are not objecting at this point, it's in light of your prior rulings and with the understanding that the Court does not want us to re-argue things that have already been decided.

So, for the record, we object to any spoliation instruction being given, but given your prior rulings, the language of this -- we're not bringing up any particular objection to how it's been written.

THE COURT: And that is as to Jury Instruction Number?

MR. MOHEBAN: That has to do with Instruction Number 9, which is the spoliation instruction.

THE COURT: Okay.

MR. MOHEBAN: My understanding from your prefatory comments is that all of these instructions, to the extent there's been prior rulings of the Court on a variety of different issues, you are not looking for us to re-litigate

them.

THE COURT: We are not re-litigating them.

MR. MOHEBAN: Right. But for preservation purposes, we want to re-assert the prior positions that we have taken just solely for preservation purposes, and that's our intent throughout all of our responses to these instructions today.

THE COURT: Very well.

I believe then Jury Instruction Number 12.

MR. MARDER: Your Honor, we only want to preserve for the record our proposed Closing Instruction Number 26 and note that we object on the basis that it doesn't include the language that was set forth in our Closing Instruction Number 26. We understand the Court has already rejected that, but just for preservation of the record, we wanted to note that.

THE COURT: Thank you.

MR. MOHEBAN: As to Instruction Number 12, we have several objections.

The first is the use of the phrase "M&I had knowledge." As was argued this morning, and I do not believe has been decided by the Court, which is this notion of aggregate knowledge. And our view is that this instruction and all instructions that have to do with actual knowledge require a showing that a particular M&I employee

had the requisite knowledge.

We further object because the instruction omits from the statement of elements any reference to the causation or damages, which are elements of this claim.

Our third objection is that the instruction does not make clear that each element must be satisfied as to the same fiduciary, and that could be cured by editing the second element to say "that PCI fiduciary" or "a PCI fiduciary."

And we also wish to preserve our objection that MUFA claims apply only to transfers accomplished by payment --

THE COURT: I just didn't hear the last part. We also want to preserve?

MR. MOHEBAN: Preserve our objection that a MUFA claim applies only to transfers accomplished by payment of a check.

MR. MARDER: Your Honor, our response is as follows:

With respect to the first one, which talks about a particular employee, you have, I believe, accurately quoted from the statute itself, which specifically says "the bank," and so I don't know how the instruction could be inaccurate if it's just quoting the statutory language.

The second issue was that it doesn't specifically

mention damages, but I think that's implied in all of these elements that you have to have damages and those damages are separately addressed at the end.

And, similarly, with regard to the language of "that fiduciary," I don't believe that language is in the statute. I think this accurately quotes from the statute, and so we'd object to that as well.

THE COURT: I will take that under advisement.

Jury Instruction Number 13.

MR. MARDER: Your Honor, again, for record preservation purposes for appeal, we note that we addressed many of the concepts in Jury Instruction 13 in our proposed Closing Instructions 26, 27, 29, 32, 34, 38, 40, and 46. And we respectfully understand that you've rejected those, but we wanted to preserve those objections for the record, that we request that the instruction be modified to be consistent with our instruction.

Beyond that, Your Honor, we do have one very particular objection, and that relates to something that was discussed this morning. This morning during the JMOL argument, we put up that *McCartney* case where the Court of Appeals in Minnesota specifically discussed the bad-faith element and gave some language that we think ought to be in the instruction.

And specifically the language is, quote, You may

find bad faith if you find that there was a reckless disregard or purposeful obliviousness to the known facts suggesting impropriety by Tom Petters or Deanna Coleman. We would respectfully request that that language be included for all of the reasons we discussed this morning.

And, Your Honor, I do just want to follow up on one question you had this morning about the red and yellow flags. During the lunch break I did look, and there was only one opinion that gave negative treatment to *McCartney*, and that's the *Buffets* opinion that we've already --

THE COURT: You said one --

MR. MARDER: -- discussed.

THE COURT: I am not hearing you. One case --

MR. MARDER: Sorry. There was only one case that gave negative treatment to *McCartney*, and that was the *Buffets* decision that we already discussed that doesn't address the issue before us at all. And those other flags that were on there are on other cases outside of the New Jersey case that the court cited with approval. So I just wanted to note that.

But, in particular, Your Honor, we do request that that specific language from *McCartney* be added. The only case that we found, as I said, that gave negative treatment to *McCartney* was that *Buffets* case, and that did not address the issue before us.

MR. MOHEBAN: Your Honor, to respond to that, of course that's the unpublished decision that plaintiff advanced this morning, which is not Minnesota law. It's not authority that should be considered by the Court.

The proper authority is the *Rheinberger* case, which is reflected in your instructions, in terms of what the definition of "bad faith" is under Minnesota law. And the *Buffets* case is squarely on point, contrary to counsel's argument.

We do have our own several objections, and the first one has to do with the statement about knowledge. We think that wherever these instructions refer to "knowledge," the term should be used as "actual knowledge" to be consistent with the statute, which uses the term "actual knowledge."

That's particularly important given that there are statements in the instructions that say that knowledge can be proven by direct or circumstantial evidence. So we do think that it should, in all cases, refer to the phrase "actual knowledge."

The reference to "direct or circumstantial evidence" here and elsewhere in the instructions is going to be confusing in light of Instruction Number 3 where the Court instructs the jury to not be concerned with terms such as "direct or circumstantial evidence."

So we believe it would be less confusing and more helpful to the jury if those references to "direct or circumstantial evidence" are omitted throughout the instructions in light of what you say in Instruction Number 3.

MR. MARDER: Your Honor, if -- I'm sorry. Are you done?

MR. MOHEBAN: I have a couple more.

We do object to the definition of "fiduciary duty," which -- because of PCI being insolvent at all times, the fiduciary duty of an insolvent corporation does not extend beyond the prohibition against self-dealing or preferential treatment. That's the *Helm* case, 212 F.3d 1076. That's an Eighth Circuit case. So we would ask that the definition of "fiduciary duty" be made consistent with that Eighth Circuit law.

And then, lastly, in the definition of "fiduciary," the Court includes the phrase "an assignee for the benefit of creditors," which we think would be confusing to the jury in this case in light of the fact that the relevant duties here are to PCI, not to PCI's creditors.

And given that the Court has taken pains to avoid reference of duties to the investors or creditors in this case, I think you can eliminate that portion of the definition without losing anything and avoiding that

confusion.

THE COURT: And let me make sure I understand your position as to that. It is what portion of the language would you like to be relieved of?

MR. MOHEBAN: There is -- on page 17 of the instructions. Have I got that right? I'm sorry. Page 14.

THE COURT: Thank you.

MR. MOHEBAN: For the definition of "fiduciary," there's a list of various parties who could be deemed a fiduciary. One of them is an assignee for the benefit of creditors. I think it's generally accurate, but in light of what -- the issues in this case, I think the Court could delete that and avoid confusion. So it's just the language in the "fiduciary" definition "an assignee for the benefit of creditors."

MR. MARDER: Your Honor, if I could respond to those points?

THE COURT: Just a minute, please.

MR. MARDER: The first --

THE COURT: I said, "Just a minute, please."

MR. MARDER: Sorry.

(Pause)

THE COURT: You may.

MR. MARDER: Thank you, Your Honor.

With respect to the first point Mr. Moheban

mentioned with respect to willful blindness, I do have a compromise position, Your Honor, that we would suggest. If you look in the footnote on page 14, you cite this *Mattingly* case and say that "willful blindness may provide a mechanism for inferring knowledge but may not substitute for knowledge."

Your Honor, the jury is not going to see the footnote, and the jury has heard over and over again the concept of willful blindness in this case. And I think to not give the jury some insight as to the legal significance of willful blindness would be confusing and unfair.

So with respect to that, our backup position, Your Honor, and our compromise position is that you at least move that up into the text so you at least instruct the jury that willful blindness may be a cause for inferring knowledge but isn't a substitute for knowledge. We think that would help clarify things a bit if you weren't inclined to give us our full willful blindness instruction.

The second point Mr. Moheban made related to actual knowledge. But the prong of the statute that we are working under is the prong that just says knowledge. It's the section that says the bank would have to have knowledge of such facts such that M&I's wiring the funds or paying the check amounted to bad faith, and that does not use the term "actual." So we would object to it for that.

We most certainly and strenuously object to the notion that the fact that you can prove your case by circumstantial evidence be removed. That is the heart of our case, and it's going to be the heart of our closing argument, that the circumstantial evidence shows knowledge. And to remove that I think would be very confusing to the jury.

With regard to the next point, Mr. Moheban asked that there be some instruction about the duty not extending beyond self-dealing. And what's going on here, Your Honor, is something that is completely inconsistent with the law.

THE COURT: When you're speaking to the duty, you mean the breach of fiduciary duty?

MR. MARDER: Yes, Your Honor. Mr. Moheban suggested that the breach of fiduciary duty should be limited to issues of self-dealing because of an insolvent corporation. And what you need to understand, Your Honor, is that the officers and directors of a corporation, as I'm sure you're aware, always have a fiduciary duty to the corporation.

In addition to that duty, when the company is insolvent, it has extra duties to the creditors. And it is that extra duty that is subject, according to Mr. Moheban's argument, to this limitation that it be limited to self-dealing.

But the company, even when it's insolvent, the company's officers always have a fiduciary obligation to the company, and none of that is limited to the concept of self-dealing. And here you've already said that our breach of fiduciary duty claim is -- relates to the duty to PCI.

So this alleged limitation that relates to an additional duty to the creditors is completely irrelevant. The duty here is the duty to PCI. That is a duty that exists in the law with respect to officers and directors and has nothing to do with the insolvency of the corporation.

Finally, Your Honor, we would object to the removal of the term "an assignee for the benefit of creditors." There's many things in this definition that don't directly apply to this case, but it gives the jury a flavor of the type of relationships that are subject to a fiduciary duty. And we don't see any reason why to single that one out and think it should remain in the instruction.

THE COURT: Let's move on to Jury Instruction Number 14.

MR. MOHEBAN: Your Honor, may I just speak to counsel's proposed compromise language?

THE COURT: Certainly.

MR. MOHEBAN: So we do not accept that as being a compromise. That proposal is just simply inconsistent with the law. This *Mattingly* case is not a Minnesota MUFA case,

and there are direct authorities, numerous direct authorities that make clear that actual knowledge under MUFA means actual knowledge. It cannot mean willful blindness. That's the *Buffets* case. That's the *Zayed* case. That's *Rheinberger*.

There simply is not a case in Minnesota that construes MUFA beyond saying what it says, in other words, actual knowledge is actual knowledge. So we strongly resist any notion that willful blindness is an element under MUFA.

MR. MARDER: Your Honor, if I could just address that very briefly. First of all, Mr. Moheban mentioned the actual knowledge standard. Again, the prong of the MUFA statute we're talking about is not the prong that requires actual knowledge. It's the prong that requires knowledge.

Secondly, Your Honor, the notion that the *Zayed* case or any other case rejected the use of willful blindness under MUFA is simply incorrect. The *Zayed* case doesn't even mention or consider the concept of willful blindness.

This case that you cited, *Mattingly*, is a generally accepted principle under the common law that willful blindness may provide a mechanism for inferring knowledge.

And the jury has heard and will hear that they're entitled to rely on circumstantial evidence. This is a key type of circumstantial evidence that we will be relying on

at trial, and they've heard about willful blindness over and over again. We think it would be prudent to at least instruct them that they can use it to infer knowledge as a matter of circumstantial evidence.

THE COURT: Very well.

MR. MOHEBAN: If I may, just because it is an important point, this is not the place to make new Minnesota law. This is a statute that uses the term "bad faith." Bad faith has been construed by *Rheinberger* to mean acting dishonestly. Actual knowledge means what it says.

And so there's no authority that converts either prong of MUFA into willful blindness. The fact that they wanted to make that part of their case doesn't make it part of the law, and so the Court should not include any instruction that has anything to do with willful blindness. It's not the law in Minnesota.

THE COURT: Let's move on, then, to Jury Instruction Number 14. I'll hear argument.

MR. MARDER: Your Honor, the plaintiff has no objections.

MR. MOHEBAN: With respect to Instruction Number 14 and consistent with the preamble to the instruction, the first element we believe should read that, "M&I owed a duty to PCI as a result of a Deposit Account Management Agreement involving Palm Beach." That's the way

this -- that's the way the plaintiff has narrowed its claim in this case, and so the jury should be focused on what is actually at issue.

Also, because we're dealing with different kinds and different fiduciary duties going in different directions, we believe that for clarity this instruction should state that Count II involves an alleged fiduciary duty owed from M&I to PCI; whereas, Count I involved an alleged fiduciary duty owed to PCI from Petters, Coleman, and White. It just might be helpful to the jury to call out that we've got the two different -- categorically different types of fiduciary duty claims based on different fiduciary duties.

THE COURT: So that's an objection?

MR. MOHEBAN: It's an objection, yes.

THE COURT: It's taken under advisement. Anything more on that?

MR. MARDER: Should we respond to that, Your Honor?

THE COURT: You may if you would like.

MR. MARDER: I will respond very briefly. I'll go to the second point first. I don't think it's necessary to identify which fiduciary duty it is because in the body of the instruction itself it mentions that M&I owed a duty to PCI.

Also, Your Honor, with respect to these various agreements, I think our Amended Complaint speaks for itself and addresses all of these various different kinds of DACAs and DAMAs.

THE COURT: Jury Instruction Number 15.

MR. MARDER: Your Honor, we have no specific objection to Jury Instruction Number 15 other than to state that we wish to preserve our objection to Instruction Number 15 for the reasons stated in our proposed jury instructions and that we request that the Court adopt the plaintiff's proposed Closing Instruction Numbers 51 and 54. But we respectfully understand that you have rejected those, but for preservation of the record purposes, we wanted to ask that our instructions be used instead.

THE COURT: Understood.

Jury Instruction Number 15 for defendants.

MR. MOHEBAN: Your Honor, defense objects to the definition of "breach of fiduciary duty" as being -- what the instruction says is when the "fiduciary fails to act in the best interests of the principal." We believe that instruction is too vague to properly instruct the jury and does not identify what the jury would have to find to constitute a breach.

We believe the instruction should state, quote, To prove that M&I breached a fiduciary duty under the Palm

Beach DAMA, plaintiff must show that M&I breached an obligation it owed under the Palm Beach DAMA.

MR. MARDER: Your Honor, our response would be the same as it was last time, and we would object to the request to limit it to one particular agreement when there were multiple agreements at issue.

MR. MOHEBAN: I would -- just in response to that, I would just say whether you find this has to do with one agreement, which we believe is plaintiff's position, or more than one, the jury still has to have some definition about what would constitute a breach.

And we think given that the allegation is that the duties arise under a contract, it follows that to breach those duties, you would have to breach a provision of the contract.

To state otherwise or to leave that undefined allows the jury to just speculate about what the duties may have been and base its decision on things that are not actual duties. The jury can be instructed as to what a breach would be.

MR. MARDER: If I could just respond to that briefly, Your Honor.

This is the same rehash of the same argument they made before, that there were only specific duties under the contract. And it is our position that there was a general

fiduciary duty, and you've already instructed the Court about -- I'm sorry. You're already instructing the jury about what their obligation is -- the bank's obligation was in the context of a general fiduciary duty. So we would object to that.

THE COURT: Understood. Under advisement.

Jury Instruction Number 16.

MR. MARDER: The plaintiff has no objection, Your Honor.

MR. MOHEBAN: Your Honor, the defense has several objections on the instruction.

First, BMO objects to the instruction because it fails to specify that the predicate fraud must be against PCI. The Court should make this clarification to avoid jury confusion and a potential belief that this claim involves fraud against investors.

The statement that "Petters, Coleman, and White committed a fraud that caused injury to PCI" is not a proper statement of the claim. The instruction must state that they committed a fraud against PCI that caused injury to PCI.

So this is consistent with the Court's rulings throughout the case that investor knowledge or duties to investors is not part of the case, and so we just want this instruction to be focused on it had to be a fraud against

PCI.

In addition, this is another place where we would ask that a reference to "knowledge" be replaced with a reference to "actual knowledge," as the cases require.

This is also a place where we would ask that the instruction make clear that it had to be an individual M&I employee with knowledge of the fraud and not the aggregate knowledge of all employees of the bank, in other words, there has to be an individual found to have aided and abetted the fraud, consistent with the *Witzman* and *Zayed* decisions that I believe the Court has relied on in the instructions, as well as the *Varga* case.

MR. MARDER: Your Honor, this first argument has been before the Court many times. It was before the Court in the JMOL and it was discussed extensively in the proposed jury instructions. And you've already indicated that you carefully considered those arguments and chose your language carefully, and I believe that you did.

It is our position that in order for there to be an underlying fraud, it has to be a fraud that caused injury to PCI. That's what we've said throughout this case and that's all we have to prove and, therefore, we think that the language is perfectly consistent and is good language because it avoids any confusion by simply leaving it to the jury to determine if there was a fraud that caused injury to

PCI, which is what we would have standing to assert.

The second objection has to do with whether it's actual knowledge or knowledge. Again, I think that would be confusing to the jury. If you look at the *Witzman* case, when it lays out the elements of aiding and abetting, I believe it just says "knowledge" and -- when it actually lays out the elements.

And with respect to the individual, again, I don't think that's necessary. You've already included an instruction that when an individual acts within their -- scope of their duties for a company, that that's attributed to the company and, therefore, I think it's covered by that.

THE COURT: Jury Instruction Number 17.

MR. MARDER: Your Honor, this is one where we -- for record preservation purposes, we ask that the Court adopt our proposed Closing Instruction Number 60, 61, and 62. But with that being said, this is again one that requires just a little bit more elaboration to succinctly state our objection.

And, specifically, Your Honor, this now goes to the *Ariola vs. Stillwater* case that we discussed during the JMOL where the court in Minnesota specifically adopted the *Global-Tech* Supreme Court opinion where it discusses willful blindness being a substitute for actual knowledge.

So we would request, Your Honor, that you include

the willful blindness instruction that we had included with our proposed closing instructions that I just enumerated.

And, Your Honor, we would again request that if you're not willing to do that, that you at least, as a compromise position, put in the language that was in your shaded footnote on page 14, that we can at least tell the jury, since they heard about willful blindness so much, that willful blindness may provide a mechanism for inferring knowledge because that is clearly the law.

Mr. Moheban objected to that in the MUFA context, saying that that's not part of the statute, but it is most certainly part of the common law. It is the common law as articulated by the Supreme Court, and it is the common law of Minnesota as adopted -- the Supreme Court's opinion was adopted in the *Ariola vs. Stillwater* decision.

And, finally, Your Honor, we would request that when discussing knowledge, there is particular language that we had asked be included in our instruction, that knowledge can be proved -- after saying that knowledge may be proved by direct or circumstantial evidence, that we explain that conducting business in an atypical or unusual way, such as violating internal policies of a company, is evidence of knowledge. We would request that that language be particularly included.

And those are our objections, Your Honor.

THE COURT: Understood.

MR. MOHEBAN: Your Honor, with respect to the proposed language from plaintiffs, we do object to all of that. As we discussed this morning, the *Ariola* case has nothing to do with this claim. It's dicta. And same thing with *Global-Tech*. The United States Supreme Court does not establish Minnesota's common law.

The common law cases that are actually on point for this claim use the term "actual knowledge," and no such case has ever substituted "willful blindness" or the "irregular business practice" language that plaintiffs propose as a substitute for proving actual knowledge for this claim. So we don't agree with any of those proposed revisions.

We do have a number of concerns about this instruction and objections, and the first being that there's an extensive outquote here of what happened in the Petters case that was read to the jury during the trial. It does not need to be called out here again in this instruction.

And we think it's prejudicial to do that here because there's language that talks about defrauding investors, fake purchase orders, and other language that, again, makes it sound like this is a claim where people are defrauding investors and that that is the fraud; whereas,

this is not a situation where BMO can be liable for investor losses. It has to be a fraud against PCI.

And so we don't believe that this language is necessary or needs to be in this instruction. It raises this investor knowledge and investor damages claim, which I know the Court has sought to avoid.

In addition to that, there's a tandem instruction, a definition that talks about the relationship between -- uses the term "general awareness," which we don't think is an element of the claim. We think that the language should be "actual knowledge." That is what is required for this. There's nothing that really calls out the term "general awareness."

This instruction also makes a reference to "direct or circumstantial evidence," which we, as we noted earlier, we think would be confusing because it's inconsistent with your Instruction Number 3 that says that the jury should not pay attention to direct or circumstantial evidence, that those terms are not important.

It's, in our view, really important that this instruction not imply in any way or suggest that this claim relates to investor losses. We think that would be a serious error, and I know the Court is trying to -- has been consistently trying to steer around that.

So we think it needs to be streamlined

considerably to eliminate the potential for making the jury believe that the fraud on investors has something to do with the fraud that's being considered here.

MR. MARDER: Your Honor, I'll just briefly respond to those points.

The first is I don't think it's problematic to include an instruction that you've already given to the jury, the reason being that these instructions are going to go into the jury room with the jury so they can refer to them and the instruction that you gave them early in the case relating to the effect of the criminal convictions was merely read to them. So we think it's very important that it be put in writing so they can bring it into the jury room.

Second of all, once again, they are rehashing this argument that you considered and rejected as to the nature of who the underlying fraud has to be on. This particular instruction very clearly sets forth all of the facts that are relevant to establishing the fraud that is at issue here.

The third point is that they've asked that the language about the general awareness of fraud be removed, and there are two problems with that. Number one, I believe that's the language that's used in the case law. And second of all, the reason that's important -- and I think what this

is referring to is the fact that the defendant need not be aware of every detail. They don't have to know exactly that it was a particular type of Ponzi scheme and how it operated. The standard is that when they do have to have knowledge, it's more of a general awareness that there was a fraud. And so I think that's what that is trying to capture and, therefore, we would disagree with taking that language out.

And, finally, Your Honor, we would certainly object to taking out the notion that knowledge can be proven by circumstantial evidence. That's the very heart of our case.

And we think rather than take that out, as we stated earlier, it should be beefed up to explain that one piece of circumstantial evidence they can use is to infer from willful blindness that there was knowledge.

MR. MOHEBAN: Your Honor, if I can respond just on the point regarding general awareness?

THE COURT: You may.

MR. MOHEBAN: Thank you.

The *Witzman* and *Zayed* cases that discuss this type of claim under Minnesota law, they don't use that phrase. And it's -- you've already got elements of the claim that talk about actual knowledge, and so this general awareness concept seems to be lessening, it seems to be diluting the

plaintiff's burden of proof. So that's another reason. We disagree with plaintiff's contention that this is somehow what the law says should be the instruction.

THE COURT: Understood.

Jury Instruction 18.

MR. MARDER: Plaintiff has no objection, Your Honor.

MR. MOHEBAN: Our only objections are what we have stated in the -- on prior instructions having to do with the aggregate knowledge issue.

This is another place where we think the instruction needs to say that an individual M&I employee had knowledge of the breach of the fiduciary duty and aided and abetted that.

And, again, where this instruction uses the term "knowledge," we would ask that it say "actual knowledge" to be consistent with the case law.

MR. MARDER: Your Honor, we've already responded to those points in the context of the previous instructions. So we just incorporate those by reference.

THE COURT: Thank you.

Jury Instruction 19.

MR. MARDER: Your Honor, the plaintiff does object. And once again for record preservation purposes, we object that the language is not consistent with our proposed

Closing Instruction Numbers 66 and 67.

Furthermore, Your Honor, this instruction is nearly -- is very similar in nature to the one we discussed earlier, which was the instruction for -- Number 13 -- sorry, Number 17, which was the other instruction relating to an aiding and abetting charge. So we have the same comments here.

We respectfully request that you include here as well the willful blindness instruction based on the case law of *Ariola vs. Stillwater* and *Global-Tech*. And once again, Your Honor, we respectfully request that if you are not willing to go that far, that you at least include as a compromise position the language that you had in your footnote that we discussed earlier.

And, finally, Your Honor, we ask for the same language relating to knowledge be tacked on, specifically that conducting business in an unusual or atypical way, such as violating internal policies, is evidence of a company's knowledge.

So also -- so we essentially adopt the same objections that we did before with respect to Instruction Number 17.

But I also believe, finally, Your Honor, that there's a typographical error in your instruction, and that has to do with on page 25 --

THE COURT: Okay.

MR. MARDER: -- it says, "The stronger the evidence of a person's or entity's general awareness of fraud." I think that language carried over from Instruction Number 17, but this one is a fiduciary duty instruction. So I think what you may have meant to say is the "general awareness of the breach of fiduciary duty" rather than "fraud," because this is an aiding and abetting fiduciary duty claim.

THE COURT: Okay. Let me make sure that I'm tracking your language that you have identified as erroneous. It's on page 25, did you say?

MR. MARDER: Yes, Your Honor. On page 25, the second sentence, it says, "Therefore, the stronger the evidence of a person's or entity's general awareness of fraud." I think that was supposed to say "general awareness of a breach of a fiduciary duty," because that would put this in context with this claim. I believe that language was copied from Number 17, which did deal with fraud, but this one deals with breach of fiduciary duty.

THE COURT: Counsel.

MR. MOHEBAN: Your Honor, we caught the same typo and were going to make the same comments. So we agree that that should say "fiduciary duty" -- "breach of fiduciary duty" and not "fraud."

Our other objections, I can just carry over the objections that we've had on prior instructions.

So this has the same issue regarding the use of the term "general awareness" as opposed to "actual knowledge."

It has the same issue regarding referencing "direct and circumstantial evidence" in light of what you say in Instruction Number 3.

And it has the same definition of "fiduciary duty" that we objected to previously regarding where we reference the *Helm* case and the limits of a fiduciary duty for an insolvent corporation.

So we are just re-asserting those as we did on prior instructions.

MR. MARDER: Your Honor, we will just incorporate our prior arguments when they made those arguments before.

And I would specifically, though, emphasize this notion that limiting this to self-dealing or anything of that nature would be completely incorrect given that we're talking about a duty the officers owed to the company, and the self-dealing is not a limit on that.

THE COURT: Anything further on this instruction?

MR. MOHEBAN: I will say to the extent that plaintiff re-asserted their claims about what the language should be and citing to I believe *Ariola* and some of the

prior arguments, we just re-assert the same responses we had to those.

THE COURT: Okay. Jury Instruction 20.

MR. MARDER: Your Honor, we do object to Jury Instruction 20. And for record reservation purposes and for appeal, we would like to object on the basis that the instruction does not include the language that we had in our Closing Instruction Numbers 74, 75, and 76, but we recognize that the Court has already considered and rejected that. However, Your Honor, we do have three very particular objections that we would like to make.

The first one is that in the context of aiding and abetting fraud, there is an additional element and specifically there is the discovery rule. And we would request that in the aiding and abetting fraud context, that it would say that with respect to that cause of action, quote, the plaintiff's claim for aiding and abetting fraud accrues when the plaintiff discovers or by reasonable diligence should have discovered the facts necessary to support the claim, because that is an additional thing that the defendant needs to prove in support of a statute of limitations defense.

I do have two other objections. One has to do with the issue of -- actually, they both have to do with this concept of fraudulent concealment, and I think there

needs to be two clarifications here on the fraudulent concealment.

One is we would request that there be an instruction that says when considering whether the concealment was not and could not have been discovered by reasonable diligence, you should consider whether the plaintiff did and could not have discovered the concealed facts by reasonable diligence, not PCI.

I think that needs to be clarified, Your Honor, because at this point it doesn't say who it is has to have acted diligently in order to give rise to this exception to the statute of limitations.

And the reason why we say that this is the law, Your Honor, has to do with that quote that we put up before, where it talks about -- when you were reasoning about why *in pari delicto* does not apply to this case, you cited the *Magnusson* and the *German American* cases and said that the -- the fact that the receiver entity is the one that went into bankruptcy cleanses the company and that affirmative defenses cannot be asserted that relate to the conduct of PCI once the receiver gets appointed.

And this is the very same concept, Your Honor, that when you're considering whether there's fraudulent concealment and you are looking at whether there's reasonable diligence, you would look at the conduct of the

receiver and not of PCI.

Secondly, Your Honor, even if you were to look at the conduct of PCI, in other contexts you had this language that, based on the *Steigerwalt* case, that determined -- that says that when considering -- and this is the proposed language we would include -- when considering what was discovered or could have been discovered by reasonable diligence, you should not consider the knowledge of someone acting to defraud PCI. That's the language that you have in your instruction relating to consent, and I think that same language needs to belong here.

We are not to look at the conduct of Mr. Petters and Ms. Coleman, for example, to determine whether they acted with reasonable diligence because they were part of the fraud and that should not be considered for purposes of the statute of limitations.

So that would be our other objection for failing to include that language, Your Honor.

MR. MOHEBAN: Your Honor, the defense's objection to Instruction Number 20 is that there just should be no language at all about tolling of the statute of limitations or anything about the discovery rule, and that's for the plain fact that PCI was party to the fraud. PCI was convicted, pled guilty to the fraud.

These tolling concepts are based on the notion

that somehow PCI would be concealed from, that somehow PCI would not know that these breaches were happening, that these frauds were happening. But no reasonable jury could find that because at all relevant times PCI was part and parcel of the fraud. So there just isn't logically a way to even argue concealment or discovery.

On the second point, you know, as has been true throughout this case, the plaintiff stands in the shoes of PCI and so to try to separate out the plaintiff from Mr. Kelley from PCI is legally impossible. They are one and the same.

This cleansing notion that was applied for *in pari delicto*, that is limited to that, but it does not limit PCI's knowledge or the fact that at all relevant times it knew about the fraud and that there could not have been concealment. Those are just plain facts of the case. They can't be undone by the fact that PCI went into bankruptcy.

So statute of limitations should be without any reference to fraudulent concealment or equitable tolling of any kind or a discovery rule.

THE COURT: And do you have case law that you would cite to support that?

MR. MOHEBAN: Case law on which aspect of that?

THE COURT: Both of your arguments.

MR. MARDER: Your Honor, could I address that

first or -- I'm sorry. Were you talking to me or were you talking to Mr. Moheban?

THE COURT: I was --

MR. MOHEBAN: Just one moment and I will have that for you. It's cited in our --

THE COURT: If it's cited in your written materials to the Court --

MR. MOHEBAN: It's the *Sussel* case.

THE COURT: Okay.

MR. MOHEBAN: It's in our proposed jury instructions. Do we know which one so we can tell the Court?

MR. YOUNT: We'll find it.

MR. MOHEBAN: We will look for it while we're going --

THE COURT: That's quite all right. I don't want to detract you from doing other things.

MR. MARDER: Could I respond, Your Honor?

THE COURT: You may.

MR. MARDER: Thank you.

Your Honor, what Mr. Moheban just articulated is the exact reason why we need these instructions. They are going to argue that when looking at the issue of fraudulent concealment, you should look at the fraudsters themselves. And this is precisely why we need this clarification.

Both of these clarifications are already clarifications that you have adopted in other contexts. One of them is that you can't look to the conduct of the fraudsters themselves who are defrauding the company. That's one that you have in your consent instruction, and it should be included here. It's a concept that you have already agreed with, and it's set forth in the *Steigerwalt* case.

The other one, which is the fact that the receivership cleansed the company, is the very language we put up before where you adopted that and specifically cited the authority of the *German American* case and the *Magnusson* case, both of which hold that the company is cleansed.

And you specifically rejected this argument, as did the Bankruptcy Court, that somehow the fact that the trustee was appointed and is governed by bankruptcy law, and they cite all kinds of bankruptcy statutes, those were all rejected, *in pari delicto* defense, and they should be rejected here as well.

Finally, Your Honor, the *Sussel* case they are referring to only has to do with one of these two concepts. It has to do -- and let me rephrase. This *Sussel* case is a very narrow exception to the exception, and what it says is that where there is one person who is both the entity and the fraudster, this doctrine doesn't apply.

But that is not the situation here, Your Honor. There were multiple employees in this company. There were multiple individuals who were not involved in the fraud that worked at the company. In fact, one of them testified here, Ms. Lindstrom.

So the *Sussel* case does not apply, and both of these doctrines that we're mentioning are doctrines that you have already adopted for other defenses and we request that they be adopted here.

MR. MOHEBAN: Your Honor, I have the authority.

THE COURT: Please.

MR. MOHEBAN: It's *Sussel vs. First Federal Savings & Loan*. It's 402 F.3d -- I'm sorry, 307 Minn. 199, 203. It's a 1976 case.

THE COURT: Just a minute.

MR. MOHEBAN: And just to clarify, so --

THE COURT: Stop.

MR. MOHEBAN: Yes.

THE COURT: 307 Minn. 199.

MR. MOHEBAN: 199, 203.

THE COURT: Thank you.

MR. MOHEBAN: There are cases where there are principals within a company that are defrauding the company and there's like this innocent part of the company. That's what Mr. Marder, I think, is trying to conjure up. But

that's not the case here.

And this *Sussel* case, which is a Minnesota Supreme Court case, deals with the sole actor doctrine and the fact that if a person who controls the company is the fraudster, as is the case here where Tom Petters controlled PCI, then you really can't work that distinction that somehow there was this innocent part of the company that could have been defrauded.

Mr. Petters, it's undisputed, controlled PCI, caused PCI to exist only for the purposes of committing the fraud. So there just isn't room here in this context to try to endorse the fiction that somehow there was some company that was being, you know, concealed from and that's why this applies.

MR. MARDER: Your Honor, if I could just respond very briefly to that, there are two problems with the argument.

Mr. Moheban said I conjured up a distinction in that case. I ask that you look at the case itself, and it very particularly is limited to the narrow situation where there is one principal and one agent and they are the same person.

Secondly, Your Honor, the *Sussel* case, if you were to see it as an exception, which you should not, it is -- only deals with this issue that you can't look at the

knowledge of the fraudster.

It does not deal with the other issue, which has to do with the company being cleansed by virtue of the receiver being appointed. That is an issue of Minnesota law, and that is an issue that you already agreed with in the context of *in pari delicto*. And by dismissing all the other equitable defenses, you have already agreed that the doctrine applies to the other defenses.

So this *Sussel* case is really just a rabbit hole that doesn't do anything for the defendants.

THE COURT: Thank you, Counsel.

Let's move on to Jury Instruction Number 21.

MR. MARDER: Sorry, Your Honor. If I could have just one moment to find my place here?

THE COURT: You may.

(Pause)

MR. MARDER: Your Honor, with respect to Jury Instruction Number 21, once again we want to preserve our rights with regard to our original instructions, which were Instructions Number 80 and 81. And recognizing the Court has rejected those, just for purposes of appeal, we wanted to object on that basis.

Our second more specific objection, Your Honor, is nearly identical to one of the objections that we asserted in response to the prior instruction. We would request that

you instruct the jury that when considering this affirmative defense, you should only consider whether PCI consented or ratified to the unauthorized act. I'm sorry. Let me rephrase that. I misspoke.

When considering this affirmative defense, you should not consider whether PCI consented or ratified the unauthorized act, but only whether the plaintiff consented or ratified the unauthorized act.

As I said before in connection with the previous instruction, there are two different doctrines that are relevant here, there's the issue of being cleansed by the receiver and there's the issue that you cannot look at the conduct of the fraudsters themselves.

You already included within this instruction the concept that you can't look at the knowledge of the fraudsters themselves. That's in there in the paragraph where you talk about full knowledge of material facts.

But the other issue, the one that you adopted in connection with *in pari delicto*, and the one that you adopted in connection with all the other defenses that you dismissed today is that the receiver -- by being appointed before the bankruptcy and by the trustee stepping into the shoes into that cleansed entity, that you cannot take into account the conduct of PCI itself and only need to look at whether the plaintiff consented or ratified the unauthorized

act.

So for that reason, Your Honor, we'd ask that that additional language be included.

MR. MOHEBAN: Your Honor, on Instruction Number 21, Mr. Marder had it right the first time. It is the ratification and consent of PCI which is at issue here. That's the party who during the course of the fraud would have been in a position to ratify or consent to the fraud. And so we actually think the instruction should be clarified to make clear that it is PCI who would provide the consent or the ratification.

The cleansing doesn't apply here, again, for the reasons that we stated in the prior defense -- or prior instruction, that is.

And then we have an issue regarding the definition of "full knowledge of material facts," because -- in Minnesota because of the sole actor rule, which imputes the knowledge of an agent to the principal. In this case, everything that Tom Petters knew was known by PCI. They are effectively one and the same. That's back to the *Sussel* case.

So, again, the Court -- the jury can find consent or ratification if it finds that PCI itself ratified or consented to either the alleged fraud or the breach of the fiduciary duty.

MR. MARDER: We would object to that, Your Honor, for -- I don't want to belabor the point. It's all the arguments we have already made, that there are two different doctrines, there's the cleansing of the receiver and there's the not looking at the knowledge of the fraudsters. The *Sussel* case does not -- only applies in narrow contexts and only relates to one of those two doctrines.

THE COURT: Let's move on to Jury Instruction Number 22.

MR. MARDER: You'll be happy to hear, Your Honor, that plaintiff has no objections to 22.

MR. MOHEBAN: Defense has no objections to Instruction 22.

THE COURT: I am happy. Thank you.

Jury Instruction Number 23.

MR. MARDER: We do have -- the plaintiff does have an objection to Jury Instruction Number 23, Your Honor. You will recall in this case -- well, first of all, before I get there, let me just say, as I have before, that we -- for preservation purposes for appeal, we certainly request that -- and object to the instruction for not incorporating our proposed Closing Instruction Numbers 88, 89, and 90.

But beyond that, Your Honor, we do have an objection to the description of the damages. You will recall that there was extensive briefing before the

Bankruptcy Court where standing came into issue, and the Bankruptcy Court said that we had standing by virtue of the fact that we were harmed and the nature of being subjected to lawsuits from investors who did not get paid.

And that concept then carried over into summary judgment and, once again, you agreed with that concept, Your Honor, when you denied the defendant's leave to appeal summary judgment.

Then there were multiple rounds of briefing on various topics, all of which contemplated what our damages were, which is that we were subjected to claims and couldn't pay claims to our investors.

Then, Your Honor, most importantly, on the *Daubert* decision, I believe it's pages 45 to 55, you very carefully and extensively went through the measure of damage and you agreed that our expert, Mr. Martens, had set forth the correct measure of damages, which was, as of the time of the bankruptcy, what were the net losses by the investors.

Having gotten those instructions by both the Bankruptcy Court and this Court, we then proceeded with that damages theory in mind and we presented that damages theory.

The defendants proposed a different damages theory at trial, which is completely inconsistent with the damages theory that you alluded to on multiple occasions and most

recently in the *Daubert* order.

So we respectfully request, Your Honor, that this be more detailed for several reasons.

One is the unfairness that would result to us from proposing and utilizing the very damages measure that the Court instructed us and that the Court gave its imprimatur to.

Second of all, Your Honor, I think that this damage instruction is very confusing because it doesn't give the jury any guide whatsoever, any yardstick, or any measure by how to measure damages. It just says "fairly and adequately compensate PCI," and we think that's very problematic.

And also, Your Honor, you may recall that the defendants proposed through their expert, Mr. Jarek, a damages measure that had to do with the amount of money that was a direct payment to the insiders; and that damages measure is completely and totally inconsistent with everything that's in the *Daubert* order.

And if this instruction goes through as written, the defendants are going to argue that damages in this case should be limited to whatever it is, the $78 million that they claim was directly paid to the individuals, ignoring, of course, all the other indirect damages. And that also would be very confusing to the jury and unfair to us and

inconsistent with the damages measure.

So, therefore, Your Honor, for all those reasons we respectfully request that you, instead of the second paragraph, you include an instruction that says as follows:

"You should award the plaintiff the amount PCI was unable to pay its creditors, i.e., the lenders' net cash losses as of the filing date of the PCI bankruptcy, which was October 11th, 2008."

That would be -- that would have the charm of being completely consistent with all the prior orders in this case and it would also clarify for the jury what the measure of damages is instead of leaving them to look at this measure of damages and not really understand what fairly compensates PCI for its harm.

MR. MOHEBAN: Your Honor, on Number 23 counsel is re-litigating the *Daubert* motion regarding Mr. Jarek that went against him and is essentially telling you that you've already directed a verdict on damages, which is certainly not in any order that you've ruled on in this case.

What you have ruled on in, I think, a fair statement is that the harm has to be to PCI and it's a fact-finding mission for the jury to determine what that fact -- what that harm was, if any. That's the full extent of how far you've gone. You have not directed a verdict on damages, and plaintiff shouldn't be allowed to try to get

that now.

The jury did hear evidence of a variety of damages theories, right? They've heard evidence that there are no damages. They've heard evidence that it's equal to the investor losses. They've heard evidence that the actual harm to PCI was the money that was looted by the investors because, as Mr. Jarek testified, although they hadn't -- although PCI had not paid back the loans, it had the money that it borrowed. The jury could validate that.

So we do think that that portion of the instruction is a standard and proper instruction. "'Damages' means a sum of money that will fairly and adequately compensate PCI for any harm." You should not take that away from the jury. You should not invite -- accept their invitation to make this a one-sided directed verdict.

Beyond that, we had a couple, I guess, more technical issues with the instruction.

One of the things that -- in the opening paragraph it doesn't make any reference at all to affirmative defenses. So what it says right now is: "Questions 5 and 6...are the damages question." If you determine that plaintiff has proved each of its elements, then you have to decide damages.

But it's more than that. If you have

determined -- the real inquiry for the jury is has the plaintiff proved the elements of its claims and are the affirmative defenses -- what's the ruling on that by the jury. Because only after you get past the affirmative defenses that you would get to damages. So we think that it should be modified to account for the fact that they have to make a decision on affirmative defenses.

We also believe that the affirmative defenses need to be referenced in the special verdict form and that they've been called out, you know, in the instructions and there should be a place on the verdict form for the jury to find whether or not there was a violation of statute of limitations or consent or ratification.

We think that at the end of this instruction -- in the first paragraph, the last sentence says, "when you decide damages." We think that is suggestive and unfair. It should be "if you decide damages" because the way the verdict form is set up, they don't answer damages unless they find liability. So by saying "when," that suggests to the jury that they're going to find liability. So we think that should be changed to "if."

And then just to make more clear what the jury should be finding is in this term "damages," the definition of "damages," where it says "a sum of money that will fairly compensate PCI for any harm," it should go on to say "for

any harm suffered by PCI."

That's consistent with your rulings throughout the case. It has to be harm. By leaving it just with the word "harm" right now, it raises the specter that the jury will get into harm to investors, which we know is off limits and should be avoided.

MR. MARDER: Your Honor, I would like to respond briefly to that.

The first point, Your Honor, is something that -- I don't want to use the word "disturbing," but completely false. We take strong exception to the characterization of us having lost the *Daubert* motion. In the *Daubert* motion we -- they argued that our expert's assessment of what damages is, which is exactly what we're proposing here, was incorrect.

On pages 45 to 50 of your opinion you went through Mr. Martens' damages measure. And the name of that section that you put in there, Your Honor, number 1, is "Consistency with the Law." You went through Mr. Martens' assessment of damages and concluded that his assessment of damages and his measure of damages was consistent with the law.

In no place in this *Daubert* order did you ever hint or state in any way that this alternative measure of monies that were paid from the company to the insiders was ever appropriate. There's nothing in that.

So we take strong exception to the notion that we lost the *Daubert* motion and, in fact, the damages measure that we are suggesting is exactly what you said Mr. Martens had testified to -- will testify to as being consistent with the law.

Secondly, Your Honor, the notion that we should change the verdict form I think is incorrect. The verdict form very clearly says who do you find on each of these elements. That encompasses the concept that we prevailed on our claim and that they didn't prevail on their affirmative defenses. It's subsumed within the question and it doesn't need to be included.

I think, actually, those are the two points that we wanted to raise in response to Mr. Moheban's comments.

MR. MOHEBAN: Your Honor, if I may just very briefly?

THE COURT: You may.

MR. MOHEBAN: Thank you.

I think Mr. Marder makes my point for me. For you to rule that their damages calculation is consistent with the law doesn't mean it's the only damage calculation that's consistent with the law. The jury ought to be able to hear the damages presentations of both parties, and there's been evidence in the record to support a variety of different damages calculations.

MR. MARDER: Nothing further on that one, Your Honor.

THE COURT: Okay. Jury Instruction Number 24.

MR. MARDER: Did you say 24, Your Honor? There's no objection to 24.

MR. MOHEBAN: Defense has no objection.

THE COURT: Jury Instruction Number 25.

MR. MARDER: No objection from the plaintiff, Your Honor.

MR. MOHEBAN: Defense objects to Number 25 because it does not make clear that the jury cannot award punitive damages unless it has found BMO liable on one or more of plaintiff's claims.

We further object to the instruction because it provides no definition of "clear and convincing evidence," or if it is, it may be that they're there and it's just not tied together. It talks about clear and convincing evidence at one point and then there's language that you must be -- "You must have a firm belief or be convinced that there's a high probability that BMO acted this way." We think that the instruction could be more clear if it just said "clear and convincing evidence means" and then state what the Court has determined the definition is.

MR. MARDER: Your Honor, we don't have a comment either way on the first objection. Obviously you don't

reach punitive damages unless there is liability found first.

So we don't have an objection to clarify this to say if you find the plaintiff -- the defendant is liable, but that's already in the jury instructions -- I mean, I'm sorry, in the verdict form. I believe you only get to the question of punitive damages if you found for the plaintiff. So I don't think that's really necessary.

The other point is we think that you've already stated the clear and convincing standard and that that is sufficient. It says, "You must have a firm belief or be convinced there's a high probability that BMO acted this way," and that is the clear and convincing standard. So I think that standard is already in there.

THE COURT: Let's move to on to Jury Instruction Number 26.

MR. MARDER: No objection by the plaintiff, Your Honor.

MR. MOHEBAN: Just one moment, Your Honor.

(Defendant's counsel confer)

MR. MOHEBAN: Your Honor, with regard to Instruction Number 26, we think that the instruction should make clear that these are factors to determine the amount of punitive damages. It says "to award punitive damages" or "to determine the amount."

MR. MARDER: Your Honor, we think that's already implicit and not necessary.

THE COURT: Okay. Jury Instruction Number 27.

MR. MARDER: The plaintiff has no objection to Jury Instruction 27, Your Honor.

However, I just want to note that there were three closing instructions that we asked for that did not make it into the jury instructions that don't relate to a particular proposed instruction that you have, but we would just like to state for the record that we would object to not including our Closing Instruction Numbers 68, which had to do with intervening cause; 69, which had to do with comparative fault; and 70, which related to no *in pari delicto*.

MR. MOHEBAN: Defendant has no objection to Instruction Number 27.

And as we're at the last instruction, I did want to make clear we have not re-asserted all of our prior positions in this hearing, but we do for preservation purposes re-assert them all and incorporate them into this discussion.

THE COURT: Understood.

MR. MOHEBAN: We do have a couple of comments on the verdict form.

THE COURT: Let me see if there is anything else

from the plaintiffs as to this matter.

MR. MARDER: Your Honor, the plaintiff does have one thing with respect to the instructions before we get to the verdict form.

You haven't said how you are going to resolve this issue of willful blindness, whether you will include a willful blindness instruction or at least this compromise that we suggested. I'm assuming you are taking that under advisement --

THE COURT: I am.

MR. MARDER: -- and we will hear it shortly?

But I just want -- just so there's no objections in our closing argument, we are going to be arguing that the case should be -- can be established by circumstantial evidence.

And just as you said in the footnote here, we are going to be arguing that willful blindness -- we're relying on that as a mechanism for inferring knowledge as part of our circumstantial case.

So I just don't want to draw an objection and interrupt, so I thought we might want to raise that now, that given what you said in the footnote here is the case law, we are at least going to argue to the jury that willful blindness is one of the factors they can look at to determine as part of the circumstantial evidence about

whether they should infer knowledge. I just wanted to raise that now in the event that there was any objection over that.

MR. MOHEBAN: We certainly do object. They've been trying every which way to get willful blindness into this case because they know they can't prove actual knowledge, as is required under Minnesota law.

We object to any form of a willful blindness instruction. There simply is no case in the state of Minnesota relating to these claims that apply willful blindness as a substitute for actual knowledge.

MR. MARDER: Your Honor, we're not here arguing for a willful blindness instruction. We've already argued that. All we're saying here is that when we do our closing, we're going to note as part of the circumstantial evidence that the defendants looked the other way when faced with clear evidence of wrongdoing by PCI, and that given the case law that you have already cited in the footnote on 14 is clearly an appropriate argument and that's all we wanted to flag here.

MR. MOHEBAN: If I may, Your Honor?

THE COURT: You may.

MR. MOHEBAN: We have not addressed the footnotes because the footnotes are not going to the jury. The Court has its own reasons for including the footnotes.

But we object again to any form of a willful blindness as a factor to be considered for anything. There's no authority in Minnesota that supports that as a substitute for actual knowledge or as evidence of actual knowledge. If they had authority on that, they would have. The closest they came to was the *Ariola* case, which is dicta involving other types of claims and not the claims here.

So we believe they should not be able to make an argument about willful blindness because it's inconsistent with Minnesota law.

MR. MARDER: And just to be clear, Your Honor, once again, we've already argued the *Ariola* issue. Now what we are saying is exactly what you said in the footnote, that we can infer knowledge from -- as part of the circumstantial case, which you have already said in your footnote is the law. So that's all we're going to be doing in our closing argument.

THE COURT: Okay. I understand your position and assume that counsel for BMO understands your position and that is appropriate.

MR. MOHEBAN: If I may -- I don't want to belabor this. May I further speak to that?

THE COURT: You may speak to it.

MR. MOHEBAN: We don't think that an argument can misstate the law. And so as things stand, without having a

ruling on that, we would be objecting in the closing to that statement. We think that the Court needs to provide us some guidance in advance of the closings.

MR. MARDER: Your Honor, I think Your Honor just did provide us with guidance, so we have nothing further to add.

THE COURT: Agreed.

Anything further that we need to address?

MR. MOHEBAN: We have some objections as to the verdict form, and we have three or four specific instructions that we just want to make a record of having requested.

THE COURT: Okay. Do you want to do the instructions and then we'll get to the verdict form?

MR. MOHEBAN: So our Closing Instruction Number 21 with respect to corporate knowledge, our Closing Instruction Number 36 regarding MUFA and actual knowledge, our Closing Instruction Number 41 involving MUFA and bad faith, and our Closing Instruction Number 63 regarding substantial assistance are all instructions that we wish that the Court would give in this case.

THE COURT: Understood.

MR. MARDER: Again, Your Honor, we object to all of those. Those are ones that have already been considered and rejected. I assume counsel is doing that to preserve

the record, just as we did with ours, and we don't really have a response other than to say that those have already been rejected.

THE COURT: That's what I understood.

Anything further?

MR. MOHEBAN: With regard to the verdict form, we have a couple of objections.

First, as I noted earlier, there is not a place for the jury to provide its decision as to affirmative defenses. And without having that in the verdict form, there's a concern that the jury could assess liability without ever considering the affirmative defenses.

The overall form of the questions on the verdict form are suggestive in a way that's favorable to the plaintiff. The questions are posed as "Do you find in favor of plaintiff," which suggests that they should find in favor of plaintiff.

A more neutral way to pose the same questions would be, for example, with respect to Count I, which alleges a violation of the MUFA, "Do you find for plaintiff or defendant?" We'd ask that it be -- the questions that the jury has to answer be presented in a more neutral fashion.

With regard to Question Number 5, we think that the term "plaintiff" is inaccurate. This is not

compensation to Doug Kelley, who is the plaintiff. This is to compensate PCI.

So it should be "What sum of money will fairly and adequately compensate PCI for any harm arising" -- "for any harm to PCI arising from any claim or claims on which you have found in favor of plaintiff?"

THE COURT: Let me make sure I'm on the same page you're on. Please direct me to where you are reading.

MR. MOHEBAN: Page 3 of the special verdict form. It's Question Number 5.

THE COURT: Thank you.

MR. MOHEBAN: And the question is: "What sum of money will fairly and adequately compensate plaintiff." We think that should be replaced with "compensate PCI." And then it should go on to say "for any harm to PCI arising from any claim or claims on which you have found in favor of plaintiff."

MR. MARDER: Your Honor, if I could respond to this point?

Are you done, Mr. Moheban?

MR. MOHEBAN: Just one moment.

THE COURT: Let's take up that one while we're on it. Okay? And then we'll come back to your other --

MR. MOHEBAN: Yes, that's fine.

MR. MARDER: Let me then address the three points

that Mr. Moheban made.

The first one is that it doesn't include the affirmative defenses, but these --

THE COURT: No. I really want to focus on this one and then we'll come back to the other two.

MR. MARDER: Oh, okay.

Your Honor, it is axiomatic, I think, that the person who is entitled to damages in a civil case is the plaintiff. Getting into compensating PCI is a can of worms for multiple reasons.

One is that PCI doesn't really exist anymore. It's a receivership entity or an entity in bankruptcy, and it is the plaintiff who is bringing this case by virtue of his standing, having been appointed as a trustee of the litigation trust.

So putting in PCI as the plaintiff I think is legally inaccurate or -- I'm sorry. So substituting "PCI" for the "plaintiff" would be legally inaccurate.

Second of all, this is really just a backdoor attempt. Throughout this whole series of jury instructions the defendants keep trying to focus on PCI because they want to argue that PCI was a wrongdoer and you shouldn't compensate a wrongdoer, and that's what is driving this.

And I think it's inappropriate because this is a civil case. The plaintiff is Mr. Kelley in his capacity as

the trustee, and he's the one who is entitled to compensation by virtue of that capacity.

MR. MOHEBAN: Your Honor, if I may?

THE COURT: Yes.

MR. MOHEBAN: The very first thing that plaintiff's counsel did in this case was stand in front of the jury in voir dire and say that Doug Kelley was not going to get a dollar. That's how this case started.

So PCI is the party. PCI is the party to whom you've ruled they have to show was harmed and was damaged. So we are going to have the word "plaintiff" in here at the end because there is a plaintiff in this case and the claims are brought by the plaintiff.

So it does say "on claims on which you have found in favor of plaintiff." That's accurate. But the compensation is for PCI, and I think that's just consistent with all the rulings that you've had in this case. It has to be harm to PCI.

MR. MARDER: Your Honor, if I could just elaborate on one point? When we said that in the -- whether it was the opening or the voir dire, I'm not sure, but it was referring to the fact that Mr. Kelley didn't have some kind of contingency where he gets some portion of the recovery in this case.

It was very clear through his testimony and

throughout the entire case that the nature of our damages is the amount that PCI owed to its investors and that the sums will then be circulated according to the bankruptcy order that's in place.

So once again, Your Honor, injecting this concept as to who has been harmed and where the money goes is completely inappropriate. The plaintiff in this case is Mr. Kelley and that's what the compensatory damage question accurately states.

And if you look at the very first page of the verdict form, it says, "Douglas Kelley, in his capacity as the trustee of the BMO Litigation Trust." It's defined for the jury. So we just don't think this is necessary.

And please let me know, Your Honor, when you want me to address his other two points.

THE COURT: Okay. I'm ready for you to address the other two points.

MR. MARDER: The first point he made, Your Honor, related to affirmative defenses and claiming that the affirmative defenses should be added.

I would respectfully suggest that this form you prepared is fair and does just that, because it says, "Do you find in favor of plaintiff and against defendant on Count I."

And that contemplates that the jury has done two

things: Number one, that we satisfied our burden of proof that there was a violation of Count I and that the elements are satisfied and, two, it subsumes the concept that they did not find that the defendants prevailed on their affirmative defenses. That's already subsumed within the question.

And within the jury instructions it's very clear that they're instructed that they shouldn't find in our favor if they find in their favor on one of the affirmative defenses. That's already been included in the jury instructions.

And so adding that concept into the jury form would promote all kinds of confusion because then you'd have to first of all say have we satisfied our affirmative elements by a particular burden of proof and then you would have to put in another section that says if the defendant satisfied the statute of limitations and have they satisfied consent by their burden of proof, and this form would become quite unwieldy where you have this whole kind of decision tree that the jury has to go through.

And I think the trend is to avoid those kinds of things because they are very confusing and all they do is give the -- confuse the jury. These are written very simply, and I would say they are elegantly simple. And that's all the jury needs to find, is whether they are in

our favor or not, as they've been instructed in the jury instructions. I think they are written neutrally.

MR. MOHEBAN: May I respond to that, Your Honor?

THE COURT: You may respond.

MR. MOHEBAN: Thank you. We're dealing with a six-question verdict form. It's been exceptionally simple. So I don't think we're at risk of complicating things beyond all measure if we made it eight instead of six to account for the affirmative defenses.

And I think we have to put ourselves in -- we all have tried cases and we understand the law and we studied the law. Our jurors -- you know, we should not expect these jurors to get to the verdict form and then go -- have to think back to, well, what about those affirmative defenses when they've been called out -- they've been told they've got six things to decide. They've got the four claims and they've got the two affirmative defenses.

Now all of a sudden, when they have to write their answers, they only see the claims and they don't see the affirmative defenses. It makes it sound like the affirmative defenses don't matter.

And it will be easy to -- it's a potential confusion. It's a potential problem where they overlook the affirmative defenses. It's easily solved, and it's not going to create too much complexity to add two questions.

MR. MARDER: Once again, Your Honor, this has already been resolved by the Court. They submitted a verdict form that included all those affirmative defenses. The parties submitted objections to the various verdict forms, under your procedures. Your Court -- Your Honor carefully considered those and chose this already, and really they are just revisiting an issue that's already been resolved by the Court. We think that these are fair and we think that the Court adopted the right procedure.

THE COURT: It has been resolved by the Court. And in resolving this issue as I have, I considered the arguments that were made before and thought about the complexity of the verdict form and what would be accessible and understandable and complete. And so the verdict form will stay as it is.

Anything further?

MR. MARDER: I think just the timing of the closing argument, Your Honor, that was raised earlier, how long that can be.

MR. MOHEBAN: Before we get to that, Your Honor, we do have one or two other things that we just want to make a record for preservation purposes.

THE COURT: Please, you may.

MR. MOHEBAN: Thank you. So we want to preserve our objection to the Court's rejection of our proposed

verdict form.

We also -- in light of the discussion we've had today, we want to preserve our objection -- or our request that there be a proposed instruction regarding this notion of willful blindness. It's a proposed additional instruction in the alternative that was among the instructions that we sought to submit earlier this week.

And with respect to all those instructions, we understand the Court has denied our submission of those, but we want to preserve our objection to that denial, I guess.

And I think that covers our issues with the instructions and verdict form.

THE COURT: Okay. Very well. And I know there's a question regarding -- that's pending regarding the length of closings. I will respond to that shortly after the hearing.

MR. MARDER: Thank you, Your Honor.

THE COURT: Anything further?

MR. REIF: Your Honor, I had two housekeeping issues, if I may? I am so sorry to belabor this.

First is just to ask whether we'll have access to the courtroom ahead of time tomorrow so that we can rearrange the lectern and other things. We're envisioning a setup similar to opening arguments. And so whenever the court instructs us we can do that, I think we would be

looking for that.

Then, second, we've been working with defendant's counsel on some suggestions they had about redactions to exhibits, and I think that we've come to an agreement. I just wanted to flag a series of plaintiff's exhibits that we will be uploading to Box with R's next to them to show that we have redacted them.

And so these are -- it's the same list of exhibits that we've discussed with defendant's counsel; and if the Court is okay, I would like to list them right now for the record.

THE COURT: (Indicating.)

MR. REIF: That would be P-20, P-21, P-26, P-48, P-57, P-114, P-185, P-185-A, P-189, and P-411. So we'll upload versions of those that have redactions consistent with the redactions for PII that defendant suggested and those will be uploaded to Box. They will be denoted with an "R" at the end. But otherwise should be ready for the jury.

MS. MOMOH: Your Honor, there was an exhibit that was identified by counsel for the plaintiff that was not on the e-mail that I had sent plaintiff's counsel with respect to redaction. It was Plaintiff's Exhibit 185-A.

I was actually in the process of sending a communication to chambers providing a status update. I still intend to send an e-mail, but before any sort of

confirmation is sent to the Court with respect to the redaction of exhibits, defendant would like the time to review the redactions by plaintiff's counsel and once --

THE COURT: How much time do you need?

MS. MOMOH: Excuse me?

THE COURT: How much time do you need?

MS. MOMOH: In the communication I was going to send to chambers, I was going to suggest by the end of the day today that we go through the exhibits and confirm that the redactions that we have identified and proposed to be done actually have been done. And so we would send the communication by this evening yet or at the latest tomorrow morning by 7:00 a.m.

THE COURT: Let's do it this evening.

MS. MOMOH: Sure, Your Honor.

THE COURT: Let's plan on 6:00 p.m.

MS. MOMOH: Yes, Your Honor.

MR. REIF: Nothing further. Thank you, Your Honor.

MS. MOMOH: Thank you, Your Honor.

THE COURT: Thank you.

MS. MOMOH: Your Honor, again, I do want to look back at our records with respect to Exhibit 185-A because again, that was not on our list. I also want to make sure that that is an admitted exhibit.

So we'll put all of the information in the communication to chambers with respect to resolution of this issue.

THE COURT: Thank you very much.

MS. MOMOH: Thank you, Your Honor.

THE COURT: Is there anything else?

MR. MOHEBAN: We just want to know what time we should be here tomorrow.

THE COURT: That's a cold call.

(The Court and law clerk confer)

THE COURT: In light of it being a cold call, as identified by the Court, what I would propose to do is sending you a text that gives you the information. And it will be given to you before the end of the business day today so you will have plenty of time to plan, but that prevents me from being overly aggressive and giving you a reasonable hour to arrive and be prepared to move forward.

MR. SCHAPER: Your Honor, perhaps a last housekeeping item. We suggested to plaintiff's counsel that, as we've done the evening before other court days, that we exchange slides, demonstratives to be used in the closing at 7:00 p.m. today and let the Court know of any objections at 7:00 a.m. tomorrow, consistent with practice.

I understand Mr. Marder has been busy, so hasn't yet sort of gotten back to us, but I just wanted to raise

that with the Court. Hopefully we will be able to work that out and we'll just go that way, but I didn't want to be raising it for the first time with the Court, you know, by e-mail or something if we don't have an agreement.

MR. MARDER: Your Honor, I have had a chance to think about this. Closing slides are not like opening slides. With opening slides you're not allowed to argue because it's an opening statement. This is closing argument.

And it seems to me that there's no need to exchange the slides, that we know -- the parties all know their obligation is to only refer to the evidence, and if that -- if it comes up in the context of the argument that we're not referring to the evidence or referring to some exhibit that was objected to and not put into evidence, they can object at that time. We don't intend to refer to any evidence that's not been admitted into the court.

And so this being closing argument, we don't want to obviously tip our hand. This is an advocacy process and don't think it's necessary for the parties to exchange and comment on each other's slides. It's closing argument.

So I think -- having considered it, I think we would object to the notion of having to exchange our slides, but obviously we defer to the Court's guidance on that.

MR. SCHAPER: Your Honor, I think the

demonstratives were handled the same way; those were exchanged beforehand. There were numerous instances, the Court knows, where one side or the other thought something was inaccurate or misleading and objections were made and ruled upon in advance so that witness examinations, for example, proceeded more smoothly.

I don't think it benefits either party, the Court, or the jury for tomorrow's closings to be littered with objections that could have been resolved in advance. Plus, I think there's some prejudice to only having an objection dealt with when something is up on the screen if one side or the other feels that it's objectionable.

So we think that, consistent with the practice so far in the case, including before the openings, that we should follow the same procedure in advance of the closings.

MR. MARDER: I just respond by saying that closing slides are inherently different. They're not like opening slides where you can't argue and they're not like when a witness is testifying where you have a demonstrative in front of the jury.

This is our opportunity to be advocates and we're going to be advocating in the slides. I can't think of an instance in the last ten years trying cases where I've had to exchange the closing slides.

We would prefer not to, but, again, we defer to

you, Your Honor.

THE COURT: And I have to hearken back to my own experience as a litigator, and I respect the lawyers in this case and respect you all to be playing in bounds and not out of bounds. And zealous advocacy is appropriate and a preview of slides is not necessary. And so it is with that that I will not be ruling on exchanging slides.

Everyone knows what's appropriate and what's not. Everybody knows what evidence has been admitted and what has not been admitted. And I expect you to comply with the Court's orders and the rules of the Court. Okay?

Anything further?

MR. MARDER: Not from the plaintiff, Your Honor.

MR. MOHEBAN: No, Your Honor.

THE COURT: Good evening. We are in recess.

(Court adjourned at 2:56 p.m.)

* * *

We, Lori A. Simpson and Erin D. Drost, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Lori A. Simpson*
Lori A. Simpson, RMR, CRR

Certified by: *s/ Erin D. Drost*
Erin D. Drost, RMR, CRR